IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Thomas Sloane, Individually and on behalf of all persons similarly situated	:	
vs	:	4:16-CV-1571
Gulf Interstate Field Service, Inc.	:	

BEFORE HONORABLE MATTHEW W. BRANN

PLACE: Williamsport, Pennsylvania

PROCEEDINGS: Oral Argument

DATE: Monday, November 21, 2016

APPEARANCES:

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(10:04 a.m., convene.)

THE COURT: All right. We have a matter set for oral argument today in the matter of Thomas Sloane, individually and on behalf of all persons similarly situated, against Gulf Interstate Field Services, Incorporated, docketed before this court to 4:16-CV-1571.

My staff advises me that on behalf of Thomas Sloane we have presenting argument James Jones from Houston, Texas as well as Alexandra Piazza from Philadelphia.

Is that correct?

MR. JONES: Yes, Your Honor.

MS. PIAZZA: Yes, Your Honor.

THE COURT: And from Gulf Interstate, Annette Idalski and Peter Hall from Atlanta, and Veronica Saltz, who I know, from Philadelphia; West Conshohocken, I guess to be precise. These are plaintiff's motions.

Who is going to present on behalf -- I assume you are, Mr. Jones. Am I right about that?

MR. JONES: Yes, Your Honor.

THE COURT: If you would like to come up to the podium and I have some questions for you. If you don't mind, I may intersperse your argument with the questions.

MR. JONES: That's fine.

THE COURT: Or maybe you both wanted to present power points. Is that right?

MR. JONES: Can I do it from here, Your Honor?

THE COURT: I'm sorry. Yes. That's right. You wanted to do a power point. You can do that.

MR. JONES: Since we're arguing two motions today, how would you like to proceed with that? Would you like to have everybody address one and then have everybody address the other?

THE COURT: Well, I think you've got the conditional certification question; you've got the Rule 23 certification.

MR. JONES: Correct.

THE COURT: The way I have it lined up in terms of my questions, I would be presenting the conditional certification question first, followed by the Rule 23 certification.

MR. JONES: That's the way I've got mine set out.

THE COURT: Good.

MR. JONES: Your Honor, this case is -- the primary issue in this case is whether or not the pipeline inspectors are paid on a salary basis. As I'm sure the Court is aware, for any employee exempt from the overtime provisions of the FLSA, they must be paid on a salary basis. Typically we are talking about a salary basis. We would be talking about 29, Section 541.602, which is the general salary statute. But because of the compensation was paid on a daily basis, you've got to go through 541.604(b) first before you get to 541.602.

The defendants in this case have raised a red herring on whether this is a day rate case or an exception case. It's really tomato/tomato {Emphasizing pronunciation}. What it all comes down to is whether they were paid on a salary basis. Without salary basis, there can't be about exemption.

As I said before, we have to go to 541.604(b) first, because that's the regulation that says if you are paying compensation on a daily basis, you can do that, and it would be a salary basis if, first -- in the first instance you have a minimum guarantee. And the -- so if you are paying compensation on a day rate basis, you can't get to the salary question, 451.602, without first going through 541.604(b). In other words, you can't get to the salary without a guarantee. And without a guarantee, there is no salary.

Case law and the DOL have made that clear for many, many years. In fact, the opinion letter from 1940 is only three years after the FLSA was first adopted and that has been the DOL's persistent condition in the 70 years since. Without a salary, you can't have an administration exemption, you can't have an executive exemption, and you can't have a highly-compensated exemption.

So the first question we have to address here is did Gulf Interstate pay its pipeline inspectors compensation based on a daily basis. Unquestionably, they did. In one of her depositions in this case, Catherine Kramer, who is the field manager for Gulf Interstate and is the head of the payroll department, I asked her, I said -- I said that the pay letters say X amount per day, that they have that language in them, that would include every pipeline inspector on every project, other than the two where they were paid hourly. Correct? She said, they state that, just like these do, yes.

And then in another part of her deposition she said that the pipeline inspectors are paid on a day rate. So if you are looking at their paystubs or their time sheets, ten years equals a day, and then they are paid the number of days per week that they're guaranteed.

So clearly, their compensation is paid in the first instance on a daily basis. If that's true, then you can't get to the salary without there being a guarantee.

So the next issue is prior to spring and summer 2014, did Gulf Interstate guarantee pipeline inspectors payment for a minimum number of days per work week. And that is the primary issue in this case. And it is the issue which makes all of Gulf Interstate's pipeline inspectors nationwide similarly situated.

THE COURT: I have a question at this point.

MR. JONES: Sure.

THE COURT: I understand there's a lot of back and forth on the day rate based on the salary issue, what was written in the engagement letters. Whether those letters were remedial measures, whether the workers had to be paid on-site or not. I have looked at all of the submissions.

But if we cut to the chase with this, it seems to me the question is did your client, Mr. Sloane, ever take a day off from work, or more precisely, was there ever a day when Mr. Sloane was not on-site?

MR. JONES: First, Your Honor, let me challenge the assumption because --

THE COURT: Well, don't do that. How about answering the question? Because it seems to me if the answer is yes, if the answer to my question is yes, you've got a problem going forward. Because as far as I can tell, your client was paid on a salary basis.

Don't you agree?

MR. JONES: I do not agree. Let's go back and answer the question. Did your client take a day off from work or was there, more precisely, ever a day when Mr. Sloane was not on-site site? Yes, there were days when he was not on-site. He worked on a project that had a seven-day schedule. So typically they worked seven days. There were weeks in which they worked only six days. They worked Sunday through Friday and he would have Friday off (indicating air quotes) in the sense that he wasn't out in the field working.

But on those days that he was supposedly (indicating air quotes) what they would call off, he was actually working, because on the days that he wasn't out in the field, he still had paperwork that he had to catch up on, which Gulf Interstate expected him to catch up on. So that he actually worked on those days. So that under a day rate plan, if he worked even just 30 minutes, he is entitled to the compensation for the entire day.

So -- and even if, let's say, that for a holiday or a sick day that he didn't work, if they, nonetheless, paid him for those days, that does not mean that they paid him a salary, because it's just as consistent with that being a salary basis that they are paying him on a day rate basis.

The reason is a company is free to pay its nonexempt employees for sick days, and it's free to pay its nonexempt employees for holidays. At my firm we do both. But that doesn't mean that that's a salary. Just because we pay our receptionist for sick days and for holidays doesn't turn her into an exempt employee. It doesn't turn her into a salary basis.

Now the opposite, if the opposite were true, if they didn't pay for sick days, so they didn't pay him for holidays, then that would devoid the salary basis. But the converse isn't necessarily true.

THE COURT: Well, it sound like he makes a salary and gets paid the same even while working off site. I mean, he's paid a salary -- he receives the same salary even if he's off-site. Don't you agree with that?

MR. JONES: Certainly. I mean, if he's on salary, he's going to get paid for that day anyway. But the fact that he works on that day, that he's filling out paperwork on that day, that he is filling out reports that he is doing as-builts, it's just as consistent that he's on a day rate because he's getting paid for that day on a --

THE COURT: Be that as it may, though, he's being paid a salary.

MR. JONES: No, Your Honor. Because he -- because he didn't have the guarantee in the first instance, which is required by 541.604(b).

THE COURT: I got that. But it sounds like -- it sounds like he wasn't on-site when he was filling out that paperwork.

MR. JONES: He was not on-site. But he is still doing work for the employer. He doesn't have to be on-site to be paid. I mean, if he's at --

THE COURT: Then it's --

MR. JONES: If he's in his trailer --

THE COURT: Then it's some sort of guarantee then from Gulf Interstate, isn't it? It's a guarantee unless he wouldn't get paid. It must be a guarantee for him or he wouldn't be paid for an off-site day.

MR. JONES: No, Your Honor. If he's paid on a day rate, okay, if he's paid on a day rate, he is entitled to his full day's pay for every day that he works. There's no limitation on the definition of work, that that be on-site. If he's working at -- I mean, you realize these people are in remote locations.

THE COURT: Yes.

MR. JONES: If he's in his trailer doing as-builts, doing time sheets, doing reports, he's still working under the definitions of the FLSA, and he is, therefore, entitled under a day rate to be paid for that day. I mean, there are plenty of cases out there that say things like anyone can be -- even an hourly employee can be made to look like he's paid a salary if he works 40 hours every week.

The fact that it looks like a salary doesn't make it a salary.

THE COURT: So he's entitled to be paid even when off-site?

MR. JONES: Under the day rate system, yes.

THE COURT: So he's entitled to be paid whether he's on-site or off-site?

MR. JONES: Correct. If he is working for -- doing work for the employer.

THE COURT: And you described that as a day rate whether he's on-site or off-site?

MR. JONES: Correct.

THE COURT: But it's no guarantee that he's going to be paid by Gulf Interstate?

MR. JONES: That's the point. That's the issue. And that's what 604(b) requires. It requires a guarantee in the first instance, before you can get to the salary question.

Without the guarantee and -- let's see if I can -- okay. If you look at the bottom opinion letter here. Let's go, first of all, to the last middle one there. The distinction between payment on a salary and payment on a daily basis is that the employee paid on a salary basis is guaranteed a minimum amount.

And if you look at the second one, which was, what, 13 years ago, payment on a daily basis without an operative salary guarantee does not qualify as salary basis of payment within the meaning of the regulations. And they were specifically talking about 604(b) in that instance.

You know, it's like the hourly employee who works 40 hours every week. They are not paid a salary unless there's a guarantee. There has to be a guarantee in the first instance.

THE COURT: Let me ask you this. At one point in your client's deposition, he says this; he's responding to a question, he says, "New York City that evening, because I remember we saw fireworks and then -- or did I -- I think I worked, yeah. We saw fireworks in New York City. So I was off Saturday" -- meaning July 5th -- "and then I go back on Sunday to the job site."

MR. JONES: Right. And that gets back to what I was talking about, about holidays and sick days, if you are paid for those, those are just as consistent with a salary as they are with a day rate or any other sort of non-exempt pay plan. Because the employer is free to pay for those holidays even to its non-exempt employees.

The fact that they do pay for those holidays to non-exempt employees doesn't convert those employees to exempt. It doesn't make it a salary. Unless, again, going back, there has to be a guarantee, in the first instance, when you are computing compensation based on a daily basis.

THE COURT: Well, it seems to me you are saying then, Mr. Jones, that Mr. Sloane never took a day off. Every day he was away from the job site, he was working for Gulf Interstate and for the same amount of hours as his on-site-site ten-hour-a-day job.

MR. JONES: No. He got paid for ten hours a day. He didn't -- there is testimony in this record, in Mr. Sprick's deposition and Ms. Kramer's deposition, that that ten hours doesn't represent the number of hours they worked each day. But that's how they -- because their payroll system is set up on an hourly basis, and if you are paid a day rate of, say, $360 a day and your payroll system is set up on an hourly basis, then what you've got to do for that employee is you've got to break down his or her day rate into an hourly rate and you've to got to be consistent with the number of hours that you put in.

THE COURT: So you are saying --

MR. JONES: In other words, they put in ten hours so that his day rate of $360 would be paid that day. So on the days where he was off-site working, and he may have been working 30 minutes, he may have been working an hour, he may have been working two hours, he was still entitled, under the day rate, to his full day's pay. If his day rate was 360, then they had to enter ten hours there for their system to pay him his day rate for that day.

THE COURT: So it was a bulk payment made to Sloane divided evenly among the number of days worked?

MR. JONES: He was paid for the days that he worked, and apparently every now and then, he was paid for a sick day or a holiday.

THE COURT: As a bulk payment?

MR. JONES: As a bulk payment?

THE COURT: Was he paid a bulk payment, then divided up by the number of days worked?

MR. JONES: No. No. No. No. If you look at the time sheets for each day that he got paid, there is ten hours. Okay. And then you look at some of the other time sheets, so the other opt-ins, where they were -- maybe they left for several days for -- you know, for personal reasons, you know, to go take care of a family member who is ill or something. You know, there would be zero in those days.

And again, not being paid for those days is consistent both with a day rate and a salary. Okay. Because a day rate you paid for the days that you worked. A salary, you can be deducted for absence for personal reasons.

But the way their pay was calculated was based on the time sheets and they were paid their day rate for each day that they worked or were otherwise paid for or because they were sick or for a company holiday.

THE COURT: It sounds to me that Mr. Sloane is paid a salary spread evenly among the weeks that he was employed. And the chart that Ms. Idalski, I'm assuming, or her colleagues, put together in her briefs shows me that, doesn't it?

MR. JONES: It shows me what he was paid. But we are back to the hourly employee who can look like he's got a salary if he works 40 hours every week.

THE COURT: But isn't a salary spread evenly amongst those weeks worked? Isn't that what the chart says?

MR. JONES: A salary can be paid -- a salary, at least on the FLSA, is on a workweek basis. You are paid X amount per week. Now, if you look at some of those charts you'll see differences between. It's not all the same. And again, just because it equals out, every paycheck is for an identical amount -- I mean, when you are working a seven day schedule, and if you get paid for all seven of those days, for whatever reason, whether you're paid on a day rate and you work all those days or you're paid a day rate and you're also paid for your sick days and your holidays, so that you get paid for all seven of those days, it's going to equal out to the same. It's going to equal out to the same amount. But that same amount doesn't mean that that's necessarily a salary.

THE COURT: Well, let me -- hold on, Mr. Jones. Let me ask you this question.

If he's on-site inspecting gaskets for 11 hours one day and the next day he's down in New York City on July 4th watching fireworks for a half an hour, he's paid the same.

MR. JONES: And that's the way a day rate works.

THE COURT: Or the way a salary works.

MR. JONES: It's also the way a salary works. And I don't disagree that that's the way a salary works. But it's also consistent -- but that doesn't mean it is a salary. Simply because it looks like a salary doesn't mean it is a salary because it's equally consistent with being paid on a day rate basis.

Now, how do you tell the difference? That's what 604(b) tells us. That's what these DOL opinion letters tell you. You tell the difference by whether there is a guarantee.

THE COURT: Well, I mean, I'm looking at, electronically, his pay period running from August 12th -- excuse me, I misspoke -- April 12th, 2014 through that first pay period -- through October 11 of 2014, which ended October 24th, 2014.

MR. JONES: Right.

THE COURT: And it looks like it's all the same. Identical. And for every period it's the same. It's $5,404.

MR. JONES: For a two week period.

THE COURT: Right. The last week is prorated for whatever reason. So the last week he's paid less.

MR. JONES: Right.

THE COURT: It's an identical amount.

MR. JONES: Exactly.

THE COURT: So that includes the pay period of early July of 2014 when he's down in New York City, by his own admission, watching fireworks.

MR. JONES: Right. But that was a holiday. That was the day everybody was off for the July 4th holiday. And again, the fact that they chose to pay everyone, including their day rate employees, for that holiday is not inconsistent with a day rate.

THE COURT: Could you bring back that language you showed me earlier? It was a couple of screens prior -- no. No.

MR. JONES: Am I going back too far? Is that it?

THE COURT: Yes. That's what I want to see.

Go ahead. Thank you.

MR. JONES: All right. So I think I left off at this issue of whether or not Gulf Interstate guaranteed the pipeline inspectors for a minimum number of days per week is the first issue upon which the plaintiff and the class are similarly situated.

Now, factually, here is what we know about that. Okay. Prior to the spring/summer of 2014 when they went back and said well, we're going to put out these letters that do say guarantee. Prior to then, every pay letter to every pipeline inspector on every project stated compensation as an amount per day.

We know that prior to spring and summer of 2014 there are absolutely no documents referencing a guarantee. Not a single one. Let me repeat that. There are absolutely, prior to that time, no documents, not a single one, referencing a guarantee.

We know that prior to April 2014, not a single pay letter specifically used the word guarantee or specifically guaranteed a minimum number of days of pay, which is what 604(b) requires.

Now instead, Gulf Interstate claims that prior to the spring and summer of 2014, all the guarantees were communicated verbally and that all of the internal communications between

Mr. Sprick and Ms. Kramer, who supposedly were the ones who determined what the guarantee was for everybody on every project everywhere, were all verbal and nothing, nothing, nothing was ever written down. And that all of the communications between Ms. Kramer in the payroll department telling them what the minimum guarantee was were all verbal and that nothing, nothing, nothing was ever written down.

Now, these last two points are really interesting, Judge --

THE COURT: Does it need, Mr. Jones, to it be written down?

MR. JONES: Absolutely.

THE COURT: Is there a regulation to that effect?

MR. JONES: There's case law to that effect.

THE COURT: What is it?

MR. JONES: I don't have it -- I'm bad about pulling names of cases off the top of my head, but it's in our briefing, if you can find that.

THE COURT: Ms. Piazza, if you can find the case, just flag me.

MS. PIAZZA: Will do.

THE COURT: Thank you.

MR. JONES: But those last two points are very interesting.

THE COURT: What if someone receives a salary and it's never written down, under this scenario?

MR. JONES: Well, okay. But we're talking about this specific scenario. Okay. Now, if I receive a salary and it's never written, there is no requirement that it need to be, because my compensation is not calculated on a daily basis. So you have to realize what we're talking about here is a very specific scenario.

When your compensation is paid on a daily basis, if you want to convert that to a salary, you have to have a guarantee in the first instance. But -- and I don't know if -- Your Honor, have you ever read Louis Nizer's book, *My Day (sic) in Court*?

THE COURT: A long time ago.

MR. JONES: Well, the prologue to that book is called, *Behind the Green Door*. And every trial lawyer I have ever trained, it's one of the first things I've required them to read is that prologue, *Behind the Green Door*, because it talks about this very, very simple idea that if X is true, then what else must also be true. Okay.

So the idea that here's a company that supposedly knows that to convert a daily payment into a salary it needs to have a guarantee, it never writes it down. It doesn't write it down in its communications to the employees in their pay letters. It doesn't say a word about a guarantee. And nowhere in its internal communications is there anything that ever references a guarantee.

And one of the things that we thought of when we were thinking, okay, if there was a guarantee, then what else needs to be true? One of those things was well, someone has got to tell their payroll clerk, when they are inputting all this stuff, that these people have a guarantee of X number of days.

Now, the guarantee isn't the same number of days for every project. So they have to know for this project, it's seven days; for this project, it's six days; for this project, it's five days. And so if there is a guarantee, what else you would expect to be true is that there will be something in writing to these payroll clerks telling them on this project it's seven days, on this project it's six days, on this project it's five days.

And Judge Fischer apparently thought that made some sense because she ordered the defendants to produce any documents like that to us or explain why they don't exist.

And what we got was the declaration of Catherine Kramer, again, the head of the payroll department, who said that she and Mr. Sprick together determined what the guarantee was going to be for each project. But that every single communication ever, within the last ten years, about that was verbal and nothing, nothing, nothing was written down. There was never an e-mail. There was never a note made. We know that, because if there was, they would have had to produce that to us.

THE COURT: Why does that matter? I mean, in my analysis of the law, I understand the point you are making, but why does that matter?

MR. JONES: It matters in that there is a significant issue in this case of whether there's a guarantee in the first instance, as required by 604(b), in this situation where they are computing compensation on a daily basis and they are trying to make it into a salary through a guarantee. There has to be a guarantee.

And yet, everything -- in the communications between Ms. Kramer and the payroll clerks, according to her, were all verbal. Never an e-mail. Never a note. Never a memo. And nothing was ever written down. The payroll clerk didn't even write it down for their own records to be able to keep up with it, because we know they didn't, because if they had, they would have had to produce that document.

So we're supposed to believe that Ms. Kramer had this didactic memory where she kept in her head the number of days guaranteed for every project, of which there were many. Yet, when, in her deposition, I asked her, can you list for me not even all the projects, all of the clients that you've done -- that Gulf Interstate has provided pipeline inspection for, she couldn't. She couldn't come up with more than three or four.

But we're supposed to believe that she kept in her head, because she never wrote it down, nobody ever wrote it down, but that she kept in her head the number of guarantee days for every single project Gulf Interstate had.

THE COURT: Mr. Jones, if it's not in writing, that doesn't mean that there wasn't a guarantee. And frankly, you know, if I look at the salary schedule that defense counsel has provided me that I have referenced before, and you know it's in their papers, isn't that really more probative? I mean, he's earning exactly the same amount of money over an every two-week period for six months or roughly that.

MR. JONES: Okay. He's earning the same amount for six months. The question is not whether he earned the same amount for six months, because as I explained to you earlier, it's just as consistent -- when you are on a seven-day schedule, earning the same amount for a six-month period is just as consistent with a day rate pay system as it is with a salary. What turns that day rate into a salary is the guarantee.

And that's why it is so important that there is not a single thing written down, not a piece of paper nowhere that references a guarantee, even where you would expect it clearly to be. And then, as I indicated earlier, there is case law that says that the guarantee required by 604.2(b) has to be in writing, has to be part of the employment arrangement, which is part of the language at 604.2(b).

THE COURT: Doesn't Ms. Kramer, not knowing the days, suggest she was using a salary expressed in terms of pay per day multiplied by 14-day increments equalling 5,400 for each pay period?

MR. JONES: And that proves what?

THE COURT: Well, she does not need to know the days set out that way.

MR. JONES: Okay. I'll give you that one. And if every project was seven days, it would be easy. But they are not all seven days. MarkWest in Ohio was -- for a while it was six days and then it turned to five days.

And there is testimony from both, I believe, Mr. Sprick and Ms. Kramer that some are seven, some are six, some are five.

THE COURT: Were all of Mr. Sloane's seven-day periods in that period of time that he worked for Gulf Interstate?

MR. JONES: Yes. He was on a seven-day schedule.

THE COURT: So they were all seven-day schedules or --

MR. JONES: Yes.

THE COURT: -- seven-day scheduled periods through his term of employment with them?

MR. JONES: Yes.

THE COURT: Or through them.

MR. JONES: And so a lot of those weeks he worked seven days. So if he's paid on a day rate, he gets paid for seven days. Okay. The only -- you know, now some of those weeks he worked six days in the field, but on that seventh day he was working at home, as he was expected to be by Gulf Interstate, doing this paperwork, including this as-built, which as I understand is just a bear to -- you know, over the time that you are there because you've got to have it completed by the time the project is completed to complete. That's really the only time you have to do it, is on a day that you are not out in the field.

And the only other days where he wasn't working in the field and he got paid anyway were sick days and a holiday, which again, is not inconsistent with being paid on a day rate basis.

THE COURT: It seems odd to me, though, that Gulf Interstate would pay its workers the same rate per day even if they were to only work ten minutes in one of those days.

MR. JONES: If they are paying them a day rate, that's not their choice. That is what a day rate is. In other words, if I'm being paid on a day rate, I work one hour, I get paid my entire day rate.

THE COURT: Or it suggests -- it might suggest to an observer that he's being paid a salary.

MR. JONES: Again, I do not disagree that it is consistent -- that it is consistent with and looks like a salary. My point is that it is just as consistent as being paid on a day rate basis. And that is why when you are paid on a daily basis, there has to be something else. And that something else is the guarantee.

THE COURT: Why would any sophisticated employer -- I would assume for the sake of argument that Gulf Interstate is a sophisticated employer -- use a day rate then? Why would they do that? What am I missing?

MR. JONES: In the oil and gas industry, 90 percent of people working out in a field -- in the field are paid on a day rate.

I can tell you after doing, you know, probably not hundreds but at least tens, multiple tens, of cases involving companies out in the oil field, I can tell you that with the exception of one that paid them hourly, everybody else was paid on a day rate.

THE COURT: That seems a curious way to do business. That's not the business I'm in, obviously. But it seems to me that if they are being paid -- if Mr. Sloane is being paid $378 a day, it looks like that's about what it is, that they would be better off putting him on salary to do that. I mean, wouldn't they do that, get ten minutes of work for $378 versus ten hours worth of work the next day for $378. Which is better? I should think it would be ten hours of work for $378.

MR. JONES: Well, again, if -- if -- if you're on a salary and if your salary is the equivalent of seven days times

$378, the fact that you don't work on a Saturday and you work at home for, you know, a half an hour doesn't mean that you get to deduct anything from that salary. I mean, that's the whole idea of 541.602, is it has to be a set amount without reduction for the, you know, amount -- the quantity or quality of the work.

THE COURT: Can you deduct from a day rate?

MR. JONES: Can you deduct for a day rate?

THE COURT: From a date rate.

MR. JONES: From a day rate, for not working a full day?

THE COURT: Right.

MR. JONES: No. No. I mean, let's -- okay. Here's a perfect example out in the field. If you work for four hours and then you're rained out. They just send everybody home. Okay. It's raining too hard. We can't weld out here. We're sending everybody home. So you only worked four hours that day.

Under a day rate plan, you get paid for your full day. Under a salary plan, you get paid for your full day. And that's why I keep saying that the fact he got paid for seven days a week during that entire time period is both consistent with -- it's consistent with a salary basis, but it's just as consistent with a day rate basis.

THE COURT: What's the difference between a day rate and a salary expressed in days?

MR. JONES: A guarantee.

THE COURT: Ms. Piazza, were you able to find any case law dealing with --

MS. PIAZZA: I think this was the case you were looking for.

MR. JONES: The case is Rodgers versus Basin School District Number 72.

THE COURT: This is in your papers, I take it?

MR. JONES: Yes.

THE COURT: Where is it in your papers?

MR. JONES: Our Plaintiff's supplemental brief of motion to facilitate notice. It's document 150 in the ECF system. It's on page three at footnote ten, at the bottom of footnote ten. And it's the District of Idaho, December 4, 2006. The Court in that case granted summary judgment on the salary basis test because the employment contracts -- this is in quotes here. "The employment contracts in this case do not express any guarantee of payment of a required weekly salary." And that case specifically dealt with the 541.604(b) case.

So because the employment arrangements, the employment -- the contracts didn't express it, okay, he granted summary judgment for the plaintiffs, saying there wasn't a salary basis because there wasn't a guarantee that was in writing.

THE COURT: So let me go back to my question, before we turn to the discussion of case law. The difference between a day rate and a salary expressed in days. So if Mr. Sloane works and is paid a thousand dollars for every ten days that he works, is that a salary or is that a day rate?

MR. JONES: It depends on whether there is a guarantee. So in addition to there not being a single document anywhere, we know that Mr. (sic) Kramer and Ms. (sic) Sprick determined the number of days that the pipeline inspector would be guaranteed for all pipeline inspectors. We know that in the spring and summer of 2014 Gulf Interstate sent out reclassification letters for its pipeline inspectors where, for the very first time, it put the guarantee in writing. And we know that all pipeline inspectors employed by Gulf Interstate, regardless of their job title, project or geographic location received those reclassification letters.

So Gulf Interstate's pipeline inspectors are similarly situated because they are all subject to the same compensation plan. And the issue regarding them, whether or not there was a guarantee in the first instance, is common to all of them.

Now, they are also similarly situated to the post spring/summer 2014 time period. That's because in these reclassification letters, Gulf Interstate still didn't get it right. Okay. In these post spring/summer reclassification letters, Gulf Interstate states that you will be paid your guaranteed salary for the work week if you are at the job site and ready and willing to work.

The regs only require that you be ready and willing to work, in 541.602(a). And the job site is the job trailer at the job site. So that the pipeline inspector has to travel from wherever his temporary quarters are to the job trailer on any day and able to be paid under the supposed guarantee for that day.

And that's adding another condition on receiving your pay under a salary that destroys both the guarantee and destroys the salary -- any salary basis that it is meant to create.

That is a -- that's actually -- they are similarly situated as of that because everybody got that letter that says that. And that's basically a question of law that the Court can determine, whether or not the addition of that additional condition destroys the guarantee and/or salary basis.

Now, the second issue under which the pipeline inspectors are similarly situated is the issue of job duties. If Gulf Interstate can prove that there was a guarantee and thus, they meet the salary basis test, they still have to prove that the pipeline inspectors made the duty test for the exemptions.

If Gulf Interstate proves that there was a guarantee and, therefore, a salary basis, the executive exemption isn't really going to be an issue because the supervisory inspectors who are within the larger class and who we proposed breaking the larger class down into non-supervisory as supervisory, and for this very reason, if Gulf Interstate proves that these pipeline inspectors were paid on a salary basis, and then you have to look at the job duties test.

We admit if they are paid a salary, the supervisory inspectors will meet the requirements of the executive exemption. So it's not -- it sort of -- those people will fall out of the class and the issue of the executive exemption falls out of the class. Or falls out of the case.

Now, the administrative exemption, which is the big one here, the administrative exemption can be broken down into two prongs. First what's called the directly-related prong. And that is where the employee's primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers. And the second prong is what we call the discretion and independent judgment prong, and that requires that the employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Now, under the directly-related prong, one way that both the regulations and courts often look at this is what is called the administration production dichotomy. And here is how that works.

If someone is clearly a production employee, then they cannot meet the directly related test. Now, the converse isn't true. If simply it was because someone is not a production employee doesn't mean that they are an administrative employee. But if they are clearly a production employee, they cannot meet the directly-related prong of the administrative exemption.

The preamble to the 2004 amendments to the regulations put it like this; the administrative exemption is limited to those employees whose primary duty relates to the administrative as distinguished from the production operations of a business.

Now, another way that both the regulations and the Court look at this directly related prong is what I call the staff line distinction. Again, in the preamble to the amended 2004 regulations, the DOL put it like this; that administrative employees can be described as staff rather than line employees. Again, that was reiterated in a DOL opinion letter back in 2010.

Here is the way I analogize the staff versus line employees. My mind goes to a Civil War battlefield. The staff employees are the people inside the tent with the map laid out and the pieces moving, making the plans. The line employees are the people outside of the tent, who then the people inside the tent say okay, go implement this plan.

Now the pipeline inspectors' status as administrative employees under both of these tools utilized by the regs and courts can be determined for the group as a whole.

Now, pipeline inspectors are clearly production employees. They are out in the field literally working on the production of the pipeline. That pipeline is being produced and they are out there day by day doing the production, doing their primary duty which is to observe and to ensure that the construction of the pipeline is being conducted in a way that complies with the specifications and requirements given to them by the pipeline owner. And some of those requirements also come through the law, through regulations of the Department and Energy and the Department of Transportation.

This is -- what is happening out in the pipeline construction situation is as close as you can get to a manufacturing production line that isn't in a manufacturing plant. So these people -- these pipeline inspectors are clearly production employees. The pipeline inspectors clearly are not staff employees. They are line employees. They are not the people in the tent making the plans. They are the people out in the field carrying out the plans.

So pipeline inspectors are similarly situated regarding whether they meet the directly-related prong of the administrative exemption with regard to their status under the administration production dichotomy and the staff versus line distinction.

The next prong that they have to --

THE COURT: Let me ask you something.

MR. JONES: Sure.

THE COURT: I found a decision in 2004 in which the United States Court of Appeals for the Sixth Circuit applied the FLSA's administration exemption to a nuclear power plant technician, whose primary role was ensuring the safety of the system. The case is Schaefer S-C-H-A-E-F-E-R, against Indiana Michigan Power Company found at 358 F.3d, page 394. The Sixth Circuit said this, quote, Although the plaintiff spends some of the time inspecting trucks, examining load bracings, inspecting shipping containers and examining shipping labels, these inspection tasks, even if not performed at his desk, are nonetheless not manual tasks. Schaefer performs manual tasks when he actually picks up a hammer to brace a load or installs or tightens a strap. Accordingly, Schaefer does not spend so much of his time on these manual tasks so as to fall outside the exempt status."

So how would you respond to that characterization in light of Mr. Sloane's primary duties?

MR. JONES: Sure. Let me back up here. Okay. I have broken the administrative exemption here down into two prongs. Technically it could be broken down into four. And one of the prongs is this performance of office or non-manual work.

So in other words, to meet the administrative exemption, you have to be performing office and non-manual work. And that's what Schaefer is addressing. They are addressing that requirement and that requirement alone.

And that's not -- while we've made the argument in our brief that the inspection work that these people do is manual labor, that's not what I'm talking about here this morning. What I'm talking about -- what I'm focusing on here this morning is directly -- what is the directly-related prong and the discretion and independent judgment.

Shaefer goes to even though the office or non-manual work language is included within the same section as directly related, it's a completely different requirement. It's an independent requirement. And what Shaefer said is what they were doing -- because if you recall this, they said they spent some of their time, okay, doing these things. And what the plaintiff was arguing is the time that they spent doing these things, they were doing manual labor. And the Sixth Circuit says no, they weren't doing manual labor when they were doing that.

Conversely, the pipeline inspectors spend all their time out in the field inspecting the construction of the pipeline. So the idea of whether or not, number one, they are doing manual labor or whether or not they are doing enough of it, which was what was raised in Shaefer, really doesn't apply here.

THE COURT: So you're saying that Mr. Sloane's work is non-manual, but his inspection of the pipeline system is not related to the general operations of the particular oil field, the gas field?

MR. JONES: And this morning -- we can put aside the manual labor part. Let's assume that his work is non-manual, because there is a very specific definition of what constitutes manual work in the regs. So let's assume that he's non-manual. Okay. So let's assume he meets that primary duties are performance of office or non-manual work. Then that's a separate requirement. But that work has to be directly related to the management or general business operations of the employer or employer's customers.

And that is where -- that requirement right there, directly related to is where both the regs and the court used the administration production dichotomy and used the staff versus line employee distinction.

THE COURT: Well, I suppose it could be said that those distinctions tend to bleed into one another a bit.

MR. JONES: Sure, they do. I mean, they are different -- there are different ways -- you mean, the administrative, production and staff and line? They are different ways of saying sort of the same thing.

In other words, if you're involved in -- if you're a production employer and you're involved in production; if you're a line employee rather than staff, then you are not -- your work is not directly related to the manual or business operations of the employer or their customers.

THE COURT: Well, Mr. Jones, if Mr. Sloane is a non-manual worker, as in the Sixth Circuit decision in Shaefer, then, perhaps, that makes it more likely that he was involved with the general business operations of Gulf Interstate.

MR. JONES: Not at all, Your Honor. And I don't think you'll ever -- you'll find a single case anywhere that makes that connection.

THE COURT: Well, he wasn't --

MR. JONES: Everybody --

THE COURT: He wasn't laying the pipe, was he?

MR. JONES: No, he wasn't.

THE COURT: He wasn't installing the pipeline?

MR. JONES: No.

THE COURT: He was overseeing the effective and safe functioning of the system, as in Shaefer, wasn't he? Shaefer here says, "Shaefer does not spend so much of his time on these manual tasks as to fall outside of exempt status."

Isn't that Sloane here?

MR. JONES: Absolutely not. Because it's a completely different question. Completely. Simply because you do not -- doing non-manual work is not enough. Otherwise, the reg would stop there and say --

THE COURT: But didn't you tell me --

MR. JONES: -- the primary duty is the performance of office or non-manual work, and it would stop.

THE COURT: But you just accepted my argument that these functions bleed into one another or blended together somewhat.

MR. JONES: No. What I -- non-manual and the -- maybe I misunderstood what your question was. Because what I said, what bleeds into each other is the administrative production dichotomy and the staff line distinction, that those bleed into each other. But the office or non-manual work doesn't bleed into the -- direct related to the management or business operations.

THE COURT: Let's look at it this way, Mr. Jones. The more manual your job is, then it seems to me the less involved you are going to be in general business policy. Wouldn't you agree?

MR. JONES: I'm sorry?

THE COURT: The more manual your job is, the less involved in general administrative policy you are going to be.

MR. JONES: Sure.

THE COURT: The more administrative in nature your job, the more you are going to be involved in general operations of the particular unit of the business.

MR. JONES: What you just said is like saying the more of a doughnut you are, you're a doughnut. In other words, if you say the more administrative your job, then the more likely you are to be directly related to. That is you have to be directly related to the management and business operations to be administrative. Now, you also have to do office or non-manual work. The office or non-manual work, that's in there because there are several places in the regulations and in the preamble to the 2004 regs where they make clear that a blue collar worker under no circumstances can be exempt.

That's why, in the beginning of that, it says you are doing office or non-manual labor. In other words, you're not a blue collar worker, okay, but the work you are doing also has to be directly related to the management or business operations of your employer or your employer's customers.

So yeah, to the extent, you know, the more blue collar you are, the less likely you are going to be administratively exempt, sure, because blue collar workers can't be exempt. Period. But simply because you work in an office or do non-manual work, that's not enough by itself.

And it doesn't even, like, start the scale tipping for directly related. Directly related, your work has to be directly related to the management or business operations of the employer or the employer's customers. And that's where you get into the administrative dichotomy, because one of the regs clearly says if you do any production work, then you are not administratively exempt. Okay. And that's why they use this -- the distinction between staff and line employees.

In other words, administrative employees, people doing work directly related to the management or business operations of the employer, I mean, those are staff people. Those are people in the tent. They are the people on the higher floors of the building. The line employees are people like Mr. Sloane who go out there on the line, literally on the production line, and do their work and carry out the plans that have been developed by the staff employees back in the tent, or back on the top floor.

Because he's out there observing, to make sure that what happens or what is happening is consistent with the specs and regulations provided to him. He doesn't decide what they are. They are given to him. And he looks at these and he says yep, it requires it be preheated to 300 degrees. Did you preheat it to 300 degrees. Yep, it requires you do two passes. Did you do two passes. And you look at it after it's done, it can only have so much undercut. Does it have more than that in terms of undercut. Does it have pin holes bigger than, you know, X size.

But he's not the one making the determination of whether or not those are the correct specs or not. He's just out there on the line making sure that what is happening complies with those specs. Very different. And we'll get to some regs in just a moment that clearly talk about things like that, making sure that things comply with, you know, specifications and requirements developed by others, you know, doesn't equal directly related and that you are not exercising independent discretion and judgment.

Which is the next issue here. And that is -- the next prong is discretion and independent judgment. Now, before we go there, let me sort of make this point. The exemptions are the defenses on which the defendant has the burden of proof. And for them to be able to apply an exemption to an employee, they have to meet each of every one of the requirements of the exemption.

So if they fail on the directly-related prong, even if they meet the discretion and independent judgment prong, then the exemption cannot apply. If they meet the discretion and independent judgment prong but fail on the directly-related prong, the exemption cannot apply.

This 541.202(e), which is where the regs start talking specifically about the type of work that inspectors do, it says, "The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures and specific standards described in manuals and other sources."

Then you go to 541.202(g). "Ordinary inspection work generally does not meet the duties, requirements for the administrative exemption. Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may have been cataloged and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They have some leeway in the performance of their work but only within closely prescribed limits."

That is the regulation for the DOL specifically talking about inspectors.

This is a case, Zannikos versus Oil Inspections from the Fifth Circuit last year where they determined that inspectors do not exercise discretion and independent judgment. If you'll see, it says, "We note at the outset that there are striking similarities between the oil inspectors' work and that of inspectors, examiners and graders who are generally non-exempt employees", in referring to the specific regs that talk about those type of employees.

This is from the Weiss report. It's a report out of the DOL. The distinction that Weiss makes here is that he says when a supervisor inspects the work of his employees, that's part of his management responsibilities. That's part of his management duties. Okay. He says, "But this kind of examining and checking must be distinguished from the kind which is normally performed by an examiner, checker or inspector, and which is really a production operation rather than a part of the supervisory."

So that's DOL saying what inspectors do, is production work.

Then in the DOL field operations handbook, which is the handbook used by their investigators, once again, they are saying that ordinary inspection work does not meet the duties requirements for the administrative exemption.

Now, Gulf Interstate admits that its pipeline inspectors are similarly situated as to job duties. When we asked them in interrogatories about what exemptions you claim apply, they say that plaintiff and the putative FLSA class members. In other words, the whole group, are exempt pursuant to FLSA's administrative executive, highly compensated and/or compensation exemptions.

They say that without regard to the project they are working on, their geographic location, their specific job title, whether they're welding inspector or code inspector or any differences in job duties that they may now claim exist.

So that Gulf Interstate's pipeline inspectors are similarly situated with regard to job duties as well as the salary basis test. I think that's -- okay.

I'm sure we're going to hear quite a bit from the defendants about Hughes. And there is two ways in which Hughes could relate but doesn't to this case. The first is, the Hughes court did conditionally certify an FLSA Class. But the Hughes court did it limited to the evidence it had before it, which is very different than the evidence that is before this Court.

The evidence available in Hughes was the declarations from plaintiffs and three pre-notice opt-ins. All three of those opt-ins worked the same project that the plaintiffs did. And so what the Hughes court did was, because that's the only evidence I have, and I don't have any evidence about outside that project, I'm going to conditionally certify an FLSA class, but I'm going to do it limited to that project.

I think it is significant to note that at the time that the motion for notice was filed in that case there had been absolutely no discovery done. So that the only evidence we had to present to the court, to the Hughes court, was the evidence of our plaintiffs and the pre-notice opt-ins.

Now, contrast that with the evidence available in this case. In this case we have the plaintiff and five pre-notice opt-ins who worked in nine different states for five different clients. But more importantly, we have evidence from the management of Gulf Interstate itself. We have the deposition testimony and the declarations from Mr. Sprick and Ms. Kramer, establishing that the pay program is uniform throughout Gulf Interstate's organization, except for the two projects where one was in California where they are paid -- where they were paid hourly.

And that makes sense being in California, since California is -- their wage and hour laws are so strict. We have available in this case the evidence regarding the reclassification letters. We have evidence regarding the complete lack of documents prior to the spring or summer of 2014. A guarantee. We have reference regarding Gulf Interstate's claim that everything regarding any guarantee was verbal. And we have evidence that Ms. Kramer and Mr. Sprick determined the number of days pipeline inspectors would be guaranteed for all projects.

That, of course, is their claim. But you know, we have absolutely no documentary evidence.

THE COURT: So are you saying, Mr. Jones, that they are paying the same rate --

MR. JONES: No.

THE COURT: -- every day in every state?

MR. JONES: Absolutely not. What I'm saying is that the decision making process is taking place at the highest level of the company in one place. So it's not that this decision making process is disbursed to, you know, all of the projects, to individual managers on each project, which you would -- which you would typically hear in a case like this. Well, they can’t be similarly situated because the person making the decisions that Mr. Sloane isn't the same person making decisions as to the class member over here in Arizona.

THE COURT: So is one person setting a different rate for each site across the United States where these people worked?

MR. JONES: Okay. Are we talking about -- when you say rate, are you talking about their day rate?

THE COURT: Well, that's what you're describing it as.

MR. JONES: No. I'm saying that they claim that this guarantee that they claim was in place prior to spring/summer of 2014, even though there is no evidence of it, there is no documentary evidence of -- there's not a single document that references a guarantee. They are saying that the decision of what the guarantee was for any project was made at a central level.

So that to prove or disprove the existence of a guarantee, that's going to rely, first, on their own documents and the lack of their documents. And it is also going to rely principally, almost exclusively, on the testimony of Ms. Kramer.

It's not a situation where we're going to have to go get evidence from, you know, 140 managers at 140 different projects.

THE COURT: So you're saying, Mr. Jones, it was the same guarantee for every inspector at every site nationwide?

MR. JONES: No. Like we talked about before, some were seven, some were six, and some were five. Again, according to their version of the story (indicating defendants), because our version is there is no guarantee, period.

THE COURT: Well, if it's different and it varies by the number of days, then it seems to me we would need to go out and look at each site and make an inquiry as to each site. The sites may not, in fact, be similar.

MR. JONES: And I guess I'll ask the question back.

THE COURT: Why are five day, six day, seven day periods the same or similar? Why are they not different?

MR. JONES: Because the key is whether or not there is a guarantee. What that guarantee is, whether it's five, six or seven, that's irrelevant. The key is is there a guarantee and -- but -- and what makes them similarly situated is that they claim that the decision as to what the guarantees were were made by two people in one place, in Houston, Texas.

So we don't have to go to 140 different sites to determine was there a guarantee at this site, was there a guarantee at this site, was there a guarantee at this site because the existence or non-existence of the guarantee, according to them, takes place with Ms. Kramer and Mr. Sprick and it ends there.

THE COURT: How do we know that there was no guarantee for each site? How do I know that there was no guarantee at Houston? There is no guarantee in Wyalusing, Bradford County, Pennsylvania?

MR. JONES: Because if they're -- prior to the spring/summer of 2014 and you are talking about an express guarantee or some documentation of a guarantee, because they would have been required -- they would have had to produce it in response to Judge Fischer's order.

Because if there were a piece of paper that was sent to the payroll -- you know, the payroll department that said for, you know, this project in Houston, Texas, the guarantee is X, they would have had to produce it. But not only did they not produce any, Ms. Kramer specifically says there aren't any documents.

THE COURT: It's your burden to show the absence of a guarantee, isn't it? And to that end, let me give you this. You can respond to this, if you care to. This cite, I'll read from the opinion. Quote, This meeting of the minds usually is memorialized in writing at the outset of the employment relationship." I'm citing a case called Cash against C-O-N-N, or Connecticut, Appliances, Inc. found at 2 F.2d Supp., page 284, a decision of the Eastern District of Texas in 1997.

"However, courts have recognized that a clear and mutual understanding may be shown through examination of the employment plea agreement and the employee's actions, that he or she understood the employment plan in spite of the after-the-fact verbal contentions otherwise." That's citing a case called Moynihan against County of Chesterfield, Virginia, found at 95 F.3d, page 1263, a decision of The Fourth Circuit in 1996, saying, "We believe that in absence -- or in the absence of a written contract, an employer can also demonstrate the existence of this clear, mutual understanding from an employment policy's practices and procedures. I'm citing a case called Stein, S-T-E-I-N, against Guardsmark, LLC, which was a decision as a Westlaw cite from the Southern District of New York from 2013.

The cite Stein versus Guardsmark seems apropos here, doesn't it?

MR. JONES: None of those cases include 541.604(b).

THE COURT: Are you sure?

MR. JONES: Yes. What all of those cases involved was a fluctuating work week requirement.

THE COURT: Say it again.

MR. JONES: Fluctuating work week. And they are part of a series of cases going one way and there are a whole series of cases going the other way, whether under the fluctuating work week reg, the agreement that the fluctuating work week reg references has to be expressed at the beginning of the employment relationship. And there are some courts that say yes, it does.

There are other courts, such as those you just cited, that says well, not necessarily because you can show that agreement through a course of conduct. You can show the clear and mutual understanding through a course of conduct. But that none of those are 604(b) about -- and discuss whether or not the guarantee can be established through a course of conduct.

In fact, I have never read a case, a DOL reg or a DOL opinion letter that says anything close to that.

THE COURT: Right. But as a broad proposition, isn't Stein against Guardsmark discussing the ability of an employment term to be applied in the absence of a written contract, regardless of what they are interpreting? Isn't that broadly what Stein against Guardsmark does?

MR. JONES: Yeah. I think any case is limited to its facts, and Stein is addressing the fluctuating work week, the clear, mutual understanding requirement of the fluctuating work week.

THE COURT: Why can't you use a course of conduct to show a guarantee under Section 604?

MR. JONES: Because then you would essentially be writing the guarantee requirement out of the regulation if you did that.

THE COURT: Why?

MR. JONES: Because 604(b) clearly requires the guarantee in the first instance and it says that the employment arrangement has to include that guarantee. The DOL opinion letters that I showed you said the difference between compensation on a daily -- between a day rate and a salary is the guarantee.

The case that Alex found for us said, in fact, that guarantee needs to be in writing in the employment agreement in the first instance or the plaintiff is entitled to summary judgment.

And I'll tell you, just sort of a policy reason, other than that, is the long discussion that you and I had previously, you know, that begins with an hourly employee can look like he's paid a salary if he works 40 hours every week. Okay?

Now, if you don't have to have an express guarantee at the beginning and you can show a salary based simply on a course of conduct, and you have an hourly employee who worked 40 hours every week so his compensation is going to be exactly the same every week, under your theory that employee is now converted to salary.

And that's not the intention of 604(b) -- 604.2(b). An intention is there has to be a guarantee. And the guarantee is what takes care of the issue that you and I were discussing earlier where it's really easy for a day rate and salary to look alike. The thing is you can't just look at the wrong numbers and say oh, okay, that's a salary. Because it can just as consistently be a day rate. And the only way you tell the difference between the two is the guarantee.

THE COURT: Well, that language seems strikingly similar to me. Let me tell you what I'm looking at here. Bear with me just a minute.

So the Stein case seems to interpret this, in any such agreement, quote, Must contain a provision for overtime pay, and the wage must be sufficient to satisfy minimum wage requirements and offer a premium of at least, quote, 50 percent of the hours actually worked over the statutory maximum, end quote.

In 1968, the Department of Labor promulgated 29 CFR, Section 778.114, an interpretive rule intended to codify and clarify Missel.

So we have that regulation interpreting hours worked language. That regulation in whole says this, "An employee employed on a salary bases may have hours of work which fluctuate from week to week, and a salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight-time pay for whatever hours he is called upon to work in a work week, whether few or many.

"Where there is a clear and mutual understanding of the parties that the fixed salary is compensation apart from overtime premiums, the hours worked each work week, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such as salary arrangement is permitted by the Act.

"If the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those work weeks in which the number of hours he works is greatest and he receives extra compensation in addition to such salary for all overtime hours worked at a rate not less than one-half his regular rate of pay; since the salary in such situation is intended to compensate the employee at straight-time rates for whatever hours are worked in the work week, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the work week into the amount of the salary to obtain the applicable hourly rate for the week.

"Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at a straight-time regular rate under the salary arrangement."

So that language seems strikingly similar to the statute both in form and substance to the regulation here. And that regulation is entitled fixed salary for fluctuating hours.

MR. JONES: Right.

THE COURT: Why can't you look at it and see that it's a day rate?

MR. JONES: Okay. Let's -- the regulation you just read is generically called the fluctuating work week regulation. For the fluctuating work week regulation to even apply to begin with, someone has to be paid on salary. In other words, it's agreed by both sides they're already being paid on a salary. And then it's just what the fluctuating work week regulation deals with is how you pay overtime on that salary.

Now, one way that you might pay overtime on salary is you say that you are -- your salary covers your first 40 hours. And we're talking about salary paid to a non-exempt employee. Okay.

In other words, if I paid my receptionist -- rather than hourly, if I paid her a salary, which I can do, it doesn't make her exempt. She's still a non-exempt employee. I'm just paying her a salary. I'll paying her a set amount every week. That's the situation this covers.

Then all that regulation talks about is how am I going to pay -- how am I going to pay her overtime. Now, one way to pay her overtime would be to say your salary covers the first 40 hours of your work week, or up to the first 40 hours. And then for hours over 40, I would pay her full time-and-a-half. So as I divide her salary for the week by 40, I would get her regular rate, and just to make it simple, let's say I pay her $400 a week, so she makes -- so if that covers 40 hours, then she is making $10 an hour. And as overtime, I would then have to pay her $15 an hour for every hour over 40.

What the fluctuating work week regulation allows if the requirements of the regulation are met, is rather than saying that salary covers the first 40 hours, it is -- there has to be a clear and mutual understanding that your salary covers however many hours you work. So if you worked 50 hours, that $400 covers your 50 hours. Okay. That $400 covers that 50 hours. So that now her regular rate, rather than being $10 an hour is -- what's 400 divided by 50 -- it is now $8 an hour.

But because that salary basically pays her her straight time for all of those 50 hours -- in other words, she has already been paid the time, then what she is owed under the fluctuating work week method is only the and-a-half. So if her regular rate for working 50 hours in a week at a salary of 400 is $8, then what she gets paid for the overtime hours for that ten overtime hours, rather than being paid $15 an hour, she gets paid $4 an hour. In other words she only gets the and-a-half.

So that regulation isn't intended to -- and doesn't define, you know, whose salary is -- who's exempt, who's not exempt. The only way it applies is it applies to someone who is salary, and they are non-exempt, which is a very different situation than we have got in 604.2(b).

And what those cases that you cited to me say is that clear and mutual understanding that your salary is going to cover whatever hours you work, that that can be shown through a course of conduct.

THE COURT: Well, let me ask you this. It seems to me what the Stein case is saying is you can infer the existence of the salary in the first place based upon course of conduct, practice, actual payment, et cetera. So why, if that's so, can't we infer the existence of a guarantee of a salary in the first place based upon the same factors? Seems to me it's analogous to this regulation you are citing.

MR. JONES: I mean, does it specifically say you infer the salary, the existence of the salary?

THE COURT: Well, you can, can't you?

MR. JONES: No. Is that what Stein says, that you can infer the existence of the salary?

THE COURT: Yes, I think so.

MR. JONES: Because it makes no sense, because again, fluctuating work week only applies if you are paid a salary and you are non-exempt.

THE COURT: But it seems to me Stein stands for a fairly broad proposition, right, and it's stating that -- it's stating a term of the employment itself, a basic term of employment law would be those inferences. Right?

MR. JONES: I don't agree with that at all.

THE COURT: We can't make inferences with regard to guarantees of a salary in the first place as a basic employment --

MR. JONES: No. No. For all of the reasons I just described. Again, if we can infer the existence of a salary -- I mean, of a guarantee from a course of conduct, that hourly employee who works, you know, 40 or 45 works every week and gets the same pay every week, they just became salaried.

In a situation where, you know, at that point in time neither the employer or the employee intended that. That's why -- that's why inference doesn't work because the same -- you can -- you can look at the same thing and it can be -- it can consistently be one of two things. And looking at that one thing, which is how much are they paid each week or every pay period doesn't, in itself, tell you anything.

THE COURT: Well, Stein is saying in part, quote, That the fixed salary as compensation may be shown through examination of the employment agreement. Section 778.114 requires, quote, a clear mutual understanding of the parties that the fixed salary is compensation and may be shown through an examination of the employment agreement and the employee's actions.

MR. JONES: Right. In that situation, that makes at least some sense. And I don't agree with it. I happen to agree with the cases that go the other way. But in that -- but in that situation, that may make some sense. Okay. In interpreting the fluctuating work week. It would make absolutely no sense in interpreting 604.2(b), because again, if you -- if you look at -- and I keep taking you back to this hourly employee who works, you know, 45 hours every week and gets paid the same amount every week. So you could put up a chart, like Ms. Idalski has there, for this hourly employee and it would show the same salary, the same amount of pay every week. But that doesn't, by itself, make him salary.

THE COURT: So you are saying general employment law principles don't apply to section 604?

MR. JONES: I'm saying that's not a general employment law principle. It's a principle in addressing the fluctuating work week regulation. But it -- it absolutely cannot be the law with regard to 604.2(b).

Otherwise, anybody who works the same amount of days every week or anybody who works the same amount of hours every week is all the sudden going to be salary, even though there is no intent for him to be, them to be.

Because again, you look at one thing that is consistent with two things. You look at a number which is equally consistent with being salary and being on the day rate. You look at two numbers which is equally consistent with being salary or being hourly. And looking at that number by itself doesn't tell you which one it is.

Let's go to the guy who gets paid by the hour and works 45 hours every week. His chart is going to look just like the one Ms. Idalski has there. You can't just look at those numbers and say well, he gets the same amount every week, therefore, he is salaried.

THE COURT: All right. But why can't you imply the existence of a salary guarantee under one regulation and not under another regulation that is very analogous? The burden is on you.

MR. JONES: Because what --

THE COURT: Hold on. It's your burden. It's Sloane's burden to show which one it is, isn't it? It's not Gulf Interstate's burden.

MR. JONES: I'm sorry? No, actually --

THE COURT: Well, it's --

MR. JONES: -- when it comes time for trial, that's her burden. Because the salary basis is part of the requirement for the exemption.

THE COURT: But to show the guarantee issue itself, I think, isn't that your burden?

MR. JONES: No.

THE COURT: Mr. Sloane's burden now?

MR. JONES: Absolutely -- I mean, to show similarly situated is my burden. But to show that there is not a guarantee is not my burden. It's their burden. If they want to say for these people who we compensate their compensation based on a daily rate, then they are salaried, it is her -- their burden to show that there is a guarantee, because that's part of the requirement of the salary basis, which is part of the requirement for the exemption.

THE COURT: You don't have to show that the class members are paid on a day rate?

MR. JONES: No.

THE COURT: How are they similar?

MR. JONES: They are similar because the question -- the relevant question is, is there a guarantee in the first instance. And that question answers the question of whether there's a salary basis. And that question is similar to the entire class.

THE COURT: Well, when I think about what the theme of the defense case is here, I use this line from their papers to me. Quote, These inspectors perform different jobs and worked in different states on different projects for different clients and reported to different supervisors, end quote.

So don't we have to get past the facial showing that each of these workers holds similarly titled positions and instead look to the economic realities of what task each inspector actually performed? Consequently, how can it be said that every member of such a sweeping class could possibly be substantially similar?

MR. JONES: Now we're jumping to doctrines. And again, on the directly-related prong and where they fit in the administrative production dichotomy and shows that they are line employees instead of the staff employees.

Even the Hughes court, even though they limited the class to a single project, I mean, it includes all pipeline inspectors. So all of those different -- I mean, a welding inspector, a coding inspector, a utility inspector, while they are specific, in other words, specifically what they do is different but their primary -- bear with me -- but their primary duty, okay, is uniform. Because their primary duty is to observe and to ensure that the construction of the pipeline is taking place in accordance with the specifications and requirements of the pipeline owner and those required by law.

So the fact that the welding inspector is watching welding and the coding inspector is measuring mills at the coding and the utility inspector is making sure that it's buried at least four feet deep, those differences don't matter because their primary duty is in -- is -- is generically to observe and ensure that it meets the specs and requirements.

THE COURT: There are different levels of inspectors, right, different types of inspectors?

MR. JONES: There are different -- well, there are different types of inspectors. I just went through some of these; welding, utility. Okay. But they all generally do the same thing. Then there are different levels. That's where we get into the supervisory versus non-supervisory.

For the salary basis question, they're all together. They are -- that applies to everyone. Even for the supervisory inspectors, if they are not paid on salary basis, if there is no guarantee and, therefore, there's not a salary basis, then they can’t be exempt.

THE COURT: Well, the listing I have are chief inspectors, assistant chief inspectors, CLR inspectors, corrosion inspectors, electrical and instrumentation inspectors, environmental inspectors, safety inspectors, utility inspectors, welding inspectors and coding inspectors.

MR. JONES: Correct.

THE COURT: Does that about cover it?

MR. JONES: That's what -- that's the list that they gave us of the type of inspectors that work on their projects.

THE COURT: So do they all work at the same day rate on the same days; they all do generally the same thing?

MR. JONES: They all do generally the same thing.

THE COURT: In the same fields, in the same states.

MR. JONES: Again, that doesn't matter. Because if the question is is there a guarantee and they say -- okay. They say there's a guarantee for everybody. Okay. So if the question is is there a guarantee, it applies to all of those people, wherever they are.

By the same token, we get into the duties test. You know, all these people are out on the production line. They are production employees, they're line employees. Therefore, they can’t be doing what is directly related to the management and business operations of the employer or its customers.

Now, independent discretion and judgment again as you saw, you know, for the last 70 years says these people don't exercise independent discretion and judgment, because what they are doing is they're comparing what is being done to something that says what should be done. That doesn't constitute independent discretion and judgment. So it doesn't matter if someone is doing that in Arizona or Pennsylvania.

The fact is since they're just comparing what's being done with what something says is how it should be done, that's not the -- that's not discretion and independent judgment. As you saw the regs, the Weiss report, the opinion letters, the DOL handbook, they all say these inspectors don't exercise independent discretion and judgment.

That's how they are similarly situated. And it doesn't matter whether they are in Arizona or Pennsylvania or Ohio or West Virginia. I don't know the directions they are but --

THE COURT: All right. I think we should take a short recess at this point.

MR. JONES: Okay.

THE COURT: Well, maybe even take a short luncheon recess. This is going to take a while to work through. We are only partway through the first question.

What's your pleasure? Would you like a recess now for lunch? It's 12:15.

MR. JONES: That's fine.

MS. SALTZ: I think that's fine, Your Honor.

THE COURT: Let's stand in recess for about an hour, until about 1:15 and pick up where we left off and then proceed with the rest of the argument. All right.

Court will rise. Thank you.

(Whereupon, a luncheon recess was taken from 12:16 p.m. to 1:40 p.m.)

THE COURT: Thank you. We're back on record now after an extended luncheon recess. I apologize to counsel. I had a call that I had to take that delayed me a bit. We left off with, I think, a discussion Mr. Jones, I was about to ask you some questions regarding Wal-Mart against Dukes.

Mr. Caselli, find me that quote again from Wal-Mart, would you please, for my benefit.

We'll begin with that, if you don't mind, answering a question regarding Dukes, which I'm sure you're familiar with.

So this is what Dukes says, relative to our case at least, and many others, I expect. Quote, What matters to class certification is not the raising of common questions, even in droves, but rather the capacity of a class-wide proceedings to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."

So that's Wal-Mart Stores, Inc. against Dukes from our Supreme Court from 2011. Who wrote the Dukes decision? Who does it sound like it?

MR. JONES: It was Scalia, wasn't it?

THE COURT: I think so. Who would write that other than Scalia? Or some other lesser court judge who would follow a Scalia-like approach to things.

So that's the seminal quote. Maybe not in Dukes, but it's one of them. Maybe it is a seminal quote. It certainly is one of them.

How does that work in this matter? How does it square, if you will, with your discussion thus far?

MR. JONES: First of all, Dukes is Rule 23. So --

THE COURT: Well, it's moving toward that. We're going to get up to that in just a moment, I think.

MR. JONES: I understand. But in terms of how it squares with what we've been discussing so far, which is section 216(b), it doesn't.

THE COURT: Yeah. But except what you're talking about are common questions, but what Justice Scalia is saying for the majority in Dukes is you also have common answers. In particular, there may be a common question regarding the existence of a guarantee.

MR. JONES: And if we're talking about Rule 23, absolutely. And I guess again -- oh, what should I say? Even in 216(b), similarly situated, the idea is -- and here is -- I guess, sort of to back up just a second. As far as 216(b), okay, I mean, we've -- I think we've gotten lost a little bit in the trees of the merits. All of these questions exist and they will need to be resolved.

But at this stage from -- for a 216(b) motion, all that we need to show is that they are similarly situated. And I suppose you could take the language of that there are common questions that have common answers. The questions that we've addressed so far; in other words, did Gulf Interstate have a guarantee as a common question. And it has a common answer.

THE COURT: It does?

MR. JONES: Yes. Because they are not saying we guaranteed it to some people but not others. They're saying we guaranteed it to everybody. We're saying they guaranteed it to nobody. And that common question of whether or not they had a guarantee is going to come back again to their documents.

It's going to come down mainly to Ms. Kramer's testimony and, you know, either a jury is going to believe her, that well, even though there is no documents that say anything about a guarantee, including the pay letters, we had one but it was all verbal, and somehow I remembered all of that in my head so that if someone had a question about it I could answer it, because I had nowhere else to go to because there is no documents that say that.

A jury is going to believe her about that or they are not going to believe her about that. But it's a common answer. Either they had guarantees or they didn't. Because they claimed the guarantees -- remember the guarantees were made by -- were decided by two people in one location.

And then on the duties test, it's the same thing. You know, did they do work directly related to management or general operations?

You know, I mean, that's a common question, which has a common answer. Either these inspectors were production employees or they weren't. Either these inspectors were line employees or they weren't.

THE COURT: Was it the same guarantee for everyone?

MR. JONES: No.

THE COURT: It varied by location? Did it vary by the rate or the hours, the days, the responsibilities?

MR. JONES: The guarantee varied by project. In other words, whether it was seven, six or five. But again, that number is irrelevant. The question is was there a guarantee, period. The question of whether or not the jury is going to believe that Ms. Kramer determined these guarantees; whether they be seven, six or five and it was all verbal and nothing ever, ever, ever was written down, and nobody ever wrote an e-mail about it and nobody ever wrote a note about it and nobody ever sent an email about it.

Despite that, it was all verbal and she had it all in her head. And she was the one who had to answer the questions if anybody had any questions, because there is nothing else for them to go to. There is no document for them to go to. The jury is either going to believe that or they're not. That doesn't turn on whether it's a seven-day guarantee or a six-day guarantee or a five-day guarantee, because there are no guarantees.

THE COURT: But don't I have to look to the circumstances of each individual employed? And doesn't it go back, ultimately, to Dukes where the court, speaking through Justice Scalia, talks about common answers? What's the common answer there?

MR. JONES: Exactly what I've been saying, that the common answer to the question of whether there were guarantees comes down to whether or not the jury believes Ms. Kramer. Because Ms. Kramer says me and Mr. Sprick decided what the guarantee was for every project. Okay.

Understand the question is, is there a guarantee. The question was this is their story. Okay. Their story is despite there is no documentation of this, despite the fact that no pay letter says a guarantee, their story is that, despite that, the fact that there's a complete lack of evidence that you would expect to be there if there was a guarantee, their story is that Ms. Kramer decided what they were going to be and then never wrote anything down and everything was verbal.

And she had -- she obviously had -- I mean, the import of all of this is she had to have it all in her head, because there is nowhere else to look. There is no document to look at. If someone comes and asks her what's the guarantee for X project, she had nowhere to look because there aren't any documents. It had to be in her head.

That's the common answer. If the jury believes her, that, you know, we had this -- we had guarantees and they were all verbal and there is no documents, it was just all in my head, if they believe her about that, that's the common answer to the question of were there guarantees.

If they don't believe her about that, that's a common answer to the question of whether there were guarantees. Because if they don't believe her about that, then there were no guarantees at any project, regardless of how many days they claim they had as a guarantee on that project.

THE COURT: All right. Well, how did she know which to -- strike that.

How did she know what to pay each of these employees?

Where did she get the numbers? Is that number the seven day -- seven calendar-day guarantee, six calendar-day guarantee, the five calendar-day guarantee? Each worker wasn't paid the same rate.

MR. JONES: No. Because they were paid the day rate. That's the answer. There wasn't a salary. There wasn't a guarantee. That's their story now. But back then, they were being paid a day rate. So that's how she knew how to pay them. She paid them for days worked and she paid them for days that they decided -- for sick days and holidays, they decided they were going to pay them anyway.

THE COURT: Why isn't the day rate merely the salary expressed in terms of days?

MR. JONES: Why is it?

THE COURT: Why isn't the day rate merely the salary expressed in terms of days?

MR. JONES: Because 604.2(b) says if that's what you're going to have, you have to have the guarantee.

THE COURT: Well, could the argument be made that the Gulf Interstate letters provided that guarantee?

MR. JONES: That what?

THE COURT: That the Gulf Interstate letters provided that guarantee.

MR. JONES: Absolutely -- prior to the spring/summer 2014, absolutely not. Because if you -- I mean, the testimony from Ms. Kramer is that prior to the time they sent out these reclassification letters, no pay letter used the word guarantee. They said things -- most of them said like $300/day worked.

Mr. Sloane's said whatever his day rate was per calendar day. But then in parentheses says as approved by the client. Now, that's not a guarantee. Anything that is subject to a third-party approval can't be a guarantee.

THE COURT: Do you have to use the word guarantee?

MR. JONES: I'm sorry?

THE COURT: Do you have to use the explicit word guarantee to make it --

MR. JONES: If you're a company that understands, okay, we want to make this a salary and understand that to make a salary we have to guarantee you a certain number of days per week, then why wouldn't you? And when they sent the reclassification letters, they did. It's very easy to do. You put it in the pay letter, instead of $365 per day worked, which is a day rate, instead of saying that, you do what they did in the spring and summer of 2014 and say $365 a day, five days guaranteed.

It's very simple to do. If you understand that this is what we're trying to do, why wouldn't you just -- I mean, all it takes it putting that one word in the pay letter and then there is no question.

THE COURT: Let me ask you this, Mr. Jones. In Sloane's case, is it $387 per day or is it $387 per day worked?

MR. JONES: His is $387 per calendar day as approved by the client.

THE COURT: Excuse me. The last part.

MR. JONES: As approved by the client. Okay. Which, again, can't be a guarantee. Because if something is conditioned on what a third party might do, okay, if the third party has the power to not approve it, which is what his pay letter says, then that's not a guarantee. That's how you're going to get three -- whatever it is, $367 per calendar day, as long as the client approves it.

But if the client doesn't approve it, you're not going to get per calendar day.

THE COURT: But per calendar day isn't a day rate, is it? Is per calendar day a day rate?

MR. JONES: Yes.

THE COURT: Or is it per day worked?

MR. JONES: Isn't it the same thing?

THE COURT: You tell me.

MR. JONES: I mean, it's exactly the same thing. If you are going to get paid, you know -- okay. Back up. Okay. If you're working a seven-day schedule, which they were on that project, then per calendar day, which is you're working an entire schedule, okay, it's the same thing as a day rate. But once -- and then once you add the as approved by the client, okay, then you've taken away any argument that by saying we're going to pay you $365 per calendar day, that that is a guarantee. Because it can't be a guarantee if some of it can be taken away by a third party.

THE COURT: If you make $100 per calendar day versus per calendar day worked and you work four days, you still get paid $500 under the first scenario, even if you are watching fireworks in New York City, but only $400 under a day worked regime. Right? So $100 per calendar day versus per calendar day worked, and you work four days.

MR. JONES: I work four days in a --

THE COURT: So you are paid $500 under the first scenario, even if on one of those days, the last day, you're down in New York City watching fireworks for Independence Day, and you are paid $400 under a day worked regime. Right?

MR. JONES: Right.

THE COURT: Okay. The rate, the rate and not the payment itself -- in other words, wasn't Sloane guaranteed payment for every calendar day, just not necessarily at that rate as the letter reads? Do you agree with that?

MR. JONES: Okay. Run that by me again.

THE COURT: Well, it's the rate -- he's paid $387 per calendar day, as approved by the client.

MR. JONES: Correct.

THE COURT: All right. So the rate and not the payment itself -- in other words, wasn't Mr. Sloane guaranteed payment for every calendar day, just not necessarily at that rate? Isn't that what the letter reads? $387 per calendar day, as approved by the client.

MR. JONES: That he's going to be paid some other rate for other days? Is that what you're saying?

THE COURT: No. He's paid $387 per calendar day, as approved by the client.

MR. JONES: Correct. So he's on a seven-day schedule.

THE COURT: What's being approved, the rate?

MR. JONES: No. The --

THE COURT: The payment?

MR. JONES: The rate is already approved. I mean, that's in his pay letter. The rate is approved. The rate has already been agreed to with the client. What is as approved by the client is the number of days. So if he's at work -- let's say that he -- he's on a seven-day schedule. Most weeks he's working seven days. So he's getting paid $365 per calendar day, right, because he's working seven days, because that's his schedule.

Let's say on week four the contractor decides we're not going to work on Saturday. So he only worked six days. Right? So $365 per calendar day would mean he would also get paid for that seventh day that he didn't work. Although, as we've gone through before, he actually did work those days. But let's assume he didn't.

So his pay letter says he would get paid for seven days as approved by the client. So if the client doesn't approve payment for that seventh day, he's not going to get paid it. And there's -- and that's why it's not a guarantee, because some third party can take part of it away.

THE COURT: Does anyone know -- I don't want to throw you off, either defense counsel or Ms. Piazza, do we have a copy of the pay letter, or can you reference that for me in an ECF document? You don't have to break off your argument, Mr. Jones. I'm just thinking of that. Do we have a copy of the pay letter?

MS. MS. IDALSKI: Your Honor, we have several. Do you want to see?

THE COURT: At some point. I don't need to see it this second, I guess. But we've got it, and you can take that up when you rebut this argument. Thank you.

Go ahead, Mr. Jones.

MR. JONES: I'm sorry. I was just explaining to your questions.

THE COURT: I've got the gist of it there. What else do you want to tell me on the first section, which is the conditional certification question, that hasn't already been addressed?

MR. JONES: I think we've pretty much covered it.
THE COURT: Exhausted it. I do, too.
Let's go on then with the Rule 23 question, which we have touched on a bit. I've got some questions for you here, as well.
MR. JONES: Sure.
THE COURT: But go ahead and start off on your argument with me. Actually much of what we have already covered also applies to the Rule 23 motion, as well.
MR. JONES: Under 23(a) you've got numerosity, which they haven’t contested here. There's at least 146 pipeline inspectors employed by Gulf Interstate in Pennsylvania during the relevant time period.
Then the issue of commonality. We go back to it and recall under Dukes, Dukes said there need be only one common issue to support classification. Here, we've got two common issues. First, you've got the salary basis test; was there a guarantee. And as we've discussed before, that has -- that is a common question which has become a common answer, which will come from the jury's belief or disbelief of Ms. Kramer's testimony about the guarantee and in the absence of any documents to support that.
Then the second common question is on the job duties. You know, we talked about the directly related and that they are production employees and that they're line employees.

Those are common questions and they have common answers.

And finally on the discretion, independent judgment. Because of the DOL's treatment, you know, of inspectors in the regulations, saying that they don't exercise discretion, independent judgment, as far as being -- you know, been consistent over the last 70 years in that position that what these people do is that they observe the construction to make sure that it conforms with the specifications that are provided by the client and by the law.

THE COURT: Let me ask you this --

MR. JONES: Sure.

THE COURT: -- right off the mark. Are you sure you're in the right court now? The plaintiff's complaint indicates that both he is a Texas resident and that the defendant, Gulf Interstate, is a citizen of Texas, by virtue of maintaining its headquarters in Houston.

MR. JONES: Right.

THE COURT: So I'm, therefore, inclined to ask whether diversity jurisdiction is proper as to plaintiff's Rule 23 claims. So this is what I'm looking at. Quote, In a class action suit, diversity between citizens requires that there must be complete diversity between the named representatives of the class and the defendants.

I'm citing for that proposition in re: Prudential Insurance Company of America Sales Practices Litigation, found at 962 Fed Supp. 450, 502, a decision in the District of New Jersey in 1997, which was affirmed sub nom. by our Circuit, 148 F3d., 283, a decision of the Circuit in 1998.

So specifically, even if supplemental jurisdiction under Section 1367 would be appropriate for a pendant state law claim or claims brought under the FLSA class, doesn't a distinct class brought under Rule 23 require a separate basis for federal jurisdiction?

How would the common nucleus of operative facts analysis play out as to the proposed Rule 23 class here?

MR. JONES: Your Honor, the 1997 case that you just referenced is before CAFA, The Class Action Fairness Act. Which provides the basis of jurisdiction here.

THE COURT: Well, flesh that out for me.

MR. JONES: I'm not sure that I can.

THE COURT: Do the best you can.

MR. JONES: There's a $5 million -- as long as $5 million total including fees is at issue, and I'm fairly sure it doesn't require complete -- it doesn't require diversity at all, as I understand it, as I recall it.

THE COURT: So that Prudential Insurance Company case has no applicability to the matter at hand.

MR. JONES: Exactly, because it's been superseded by statute.

THE COURT: Okay.

MR. JONES: I wish I was more familiar with CAFA.

THE COURT: No. Your point is made.

Did you plead CAFA jurisdiction here and were you required to?

MR. JONES: I don't know if we specifically pled it.

THE COURT: I don't recall.

MR. JONES: But I don't believe we were specifically required to.

THE COURT: Why not?

MR. JONES: What's that?

(Off-the-record discussion between counsel.)

MR. JONES: Apparently I'm told we had supplemental jurisdiction, so we didn't plead CAFA.

THE COURT: Well, I don't recall that from the --

MR. JONES: I don't believe we specifically pled CAFA but --

THE COURT: Let me ask you this, Mr. Jones.

MR. JONES: Yes.

THE COURT: My understanding is that the scrutiny that must be applied on the Rule 23 certification motion is considerably more stringent in searching because that certification would establish a class as a legal matter. So do you agree with that characterization, and what might it mean when applied to this case in particular?

MR. JONES: I agree with the characterization in terms of what we've been discussing so far. I don't think it has any bearing on it, because I believe that the idea of the common questions that we've been discussing; you know, is there a guarantee and then, you know, are they production line employees and do they, by the nature of what they do, meet the discretion independent judgment?

I think that meets any standard that you can put to it in terms of there being common questions with common answers that will predominate over any individual issues.

In fact, for example, with the guarantee question there won't be any individual issues involved in that, because Ms. Kramer has said, you know, our story is as to why we claim there's a guarantee, you know, is that those decisions were made by two people in one location and then applied to everybody. So there is no individual questions. There's -- in other words their story is not that we guaranteed a minimum number of days to people on this project, this project and this project but not this project, this project and this project.

Their story is we guaranteed a minimum number of days to everybody. So it's a common question, has a common answer. It doesn't involve individualized issues because it all comes down to Ms. Kramer.

And similarly, whether they are a line employee or a production employee, that -- that is not going to involve individualized questions because these people -- it's not like any of these inspectors do their job from some remote location. They are all out on the production line. They are all production employees. They are all line employees. So you've got a common question with a common answer without any individualized issues.

THE COURT: On that point, though, let me swing back to something else.

MR. JONES: Okay.

THE COURT: Why do you think there should be supplemental jurisdiction or why do you think supplemental jurisdiction would be proper for an entirely distinct class? Wouldn't that class have a different nucleus of operative facts, depending on different exemptions, different locations, different legal questions? Why is supplemental jurisdiction proper for an entirely distinct class? Everything is different, isn't it?

MR. JONES: Not everything.

THE COURT: Well --

MR. JONES: I mean, the operative -- I mean, just take our conversation here, Your Honor. I mean, for the FLSA claims, we've been talking about the very same things from the FLSA claims that we're been talking about for Pennsylvania claims. It is the same nucleus of operative facts. In fact, there's the same common questions. There's the same common answers. It's not entirely different at all. It is still, was there a guarantee in the first instance; were you a production employee or a line employee.

The only difference between the two is that there is no highly compensated under Pennsylvania law.

THE COURT: Let me give you a case from a Federal District Court in Texas, of all places. This is what this court said. "Plaintiffs are, instead, asking the Court to exercise supplemental jurisdiction over an entirely different class of state law claims which provide for entirely different remedies. Thus, the Court must determine whether the Dinns" -- that's the gentleman, D-I-N-N-S -- "claims under the DTPA are maritime torts that may be preempted by federal maritime law or -- excuse me -- "that may be preempted by federal maritime law or torts of local concern governed by Texas law. For the court to exercise admiralty jurisdiction over a tort claim, the activity from which the claim arises, quote, must satisfy conditions of both location and connection with maritime activity."

The case is Dinn, D-I-N-N, against Hooking Bull Boatyard, Inc., which is a decision from The Southern District of Texas from July 6th of 2009. It's 2009, Westlaw 2161676. Appeared to have declined to exercise jurisdiction in that case. Different legal questions. Different remedies. Different exemptions.

Isn't that what we have here?

MR. JONES: No. And there is no question of preemption. That is -- as I understand what you read, that was Jones Act case in the question of whether you were going to separate jurisdiction over a state law common law tort claim. It was a very different question than -- I mean, these are -- these are both wage and hour overtime claims. The reason that plaintiff's claim that the member of FLSA Class and Pennsylvania Class were entitled to over time are exactly the same, the questions that we have gone through several times are exactly the same.

I can't think of a situation where it would be much more common, a common nucleus of operative facts than we have here.

It's just that there is a state law which addresses the same issue as the FLSA. And under that state law you bring a Rule 23 class. But the facts underlying both claims are exactly the same.

THE COURT: Well, indeed it's a Jones Act case. But my point is there was simply different legal remedies that destroyed supplemen tal jurisdiction.

Let me give you a different case. This is from New England. "In this case it is clear that the claims of the first three subclasses and the claims of fourth subclass do not, quote, derive from a common nucleus of operative fact, end quote. Each subclass asserts different factual scenarios involving overpayments made by covered individuals for particular services.

The first subclass asserts overpayments as a result of misdesignation of participating providers. The second asserts overpayments because of partial processing of claims. The third asserts overpayments because of the miscrediting of deductible payments. The fourth assets overpayments because of miscalculation of percentage copayments.

Indeed, the fourth class asserts classifications of two plans that are different from the plan at issue and the claims asserted by the first three subclasses. There are virtually no overlapping fact between these claims except for the fact that they are made against the same defendant. The claims as asserted by subclasses could have easily been brought as four separate class actions that would not ordinarily be expected to be consolidated into one judicial proceeding.

Therefore, this is not an appropriate case for the exercise of supplemental jurisdiction over the Caranci plaintiffs claims. I'm citing the case of Caranci, C-A-R-A-N-C-I, against Blue Cross and Blue Shield of Rhode Island found at 194 FRD, page 27, specifically page 37, by The District of Rhode Island from 2000. So that's another case -- I mean, not a Jones Act case but you see my point.

MR. JONES: No, actually I don't. Because as I listened to you read --

THE COURT: My point is there are different legal remedies that may destroy supplemental jurisdiction.

MR. JONES: But that's not what that says. That says there is no common nucleus of the operative facts. They are different claims entirely. They are based on different underlying facts. One is an overcharge because they did it this way. One is an overcharge because they did it this way. Another is an overcharge because they did it this way. So there is no common nucleus of operative fact.

Here, there is clearly of the common nucleus of the operative facts, because both in the FLSA claim and the Pennsylvania Minimum Wage Act Claim, they are exactly the same underlying operative facts; that there was no guarantee, therefore, there is no salary basis, therefore they are not exempt. They are production employees. They are line employees. Therefore, they are not exempt. That they didn't exercise discretion of independent judgment. Therefore they are not exempt. Those exact same operative facts exist in both.

The case you just read to me had different operative facts in each subclass. And as I heard it, that's exactly why the Court ruled like it did.

THE COURT: So there are or there are not different exemptions under Pennsylvania Minimum Wage Loss and the FLSA?

MR. JONES: There is one additional under the FLSA that doesn't exist under Pennsylvania.

THE COURT: What about a different reward? What about backpay? What about punitive damages? If the differences don't matter, then why is not the decision of my sister court, The Southern District of Ohio in Hughes controlling?

MR. JONES: Which decision?

THE COURT: Well --

MR. JONES: {Laughter} We've got the --

THE COURT: It seems to me what I've got here is the summary judgment decision should control. I'm referencing Judge Sargus's decision in summary judgment.

MR. JONES: It doesn't control, number one, because there is no summary judgment before this Court. And number two, Judge Sargus got it absolutely, completely wrong, which eventually hopefully the Sixth Circuit will recognize.

THE COURT: Well, we had a telephone conference call, whatever it was, two months ago, and it seems to me the whole argument on the telephone conference -- I think you were on that call, Mr. Jones, that the -- there are differences in exemptions that come into play with this new subclass.

Now I have said well, what about supplemental jurisdiction along the same lines, and I'm told the differences don't matter.

MR. JONES: No. But for supplemental jurisdiction, the fact that Pennsylvania does not have are a highly compensated exemption and the FLSAs does isn't enough of a difference to defeat supplemental jurisdiction. We were talking about two very different issues -- in the phone call we were talking about one thing. Now we are talking about something completely different. We're talking about supplemental jurisdiction now. We were talking about something completely different on the phone call.

THE COURT: Are they really all that different?

MR. JONES: Is what all that different?

THE COURT: When we talked about it on the phone, when I look back it's almost three months ago now, the end of August, and what we're talking about today, if the exemptions aren't that big a difference, the exemptions are not that different, then the Hughes decision may be more controlling than I thought it was initially. I'll think about that.

MR. JONES: The Hughes --

THE COURT: Judge Sargus may be more on point than you are willing to give him credit for.

MR. JONES: No. The Hughes decision --

THE COURT: You're not like Paul Clement, are you? You don't think all district court judges are stupid, do you?

MR. JONES: {Laughter} No. But they do get things wrong. And Judge Sargus got this one wrong.

THE COURT: Absolutely. No question about it.

MR. JONES: Judge Sargus, in the Hughes summary judgment, had only to do with the FLSA. Our point in our Rule 23 motion about how that ruling doesn't apply to this case or shouldn't apply to this case has nothing to do with the fact of the difference of one exemption. It has to do with, number one, we don't have a -- we're not dealing with a summary judgment here. And number two, that Judge Sargus just completely got it wrong and took a line of cases that have nothing to do with this case, took a single out of one of those cases and based his whole opinion about that and essentially wrote the guarantee requirement out of the analysis.

THE COURT: By the way, where is that case? Is that on appeal now to the Sixth Circuit?

MR. JONES: No, because --

THE COURT: Tell me where we are.

MR. JONES: The summary judgment was only as to the two named plaintiffs. And we have like 79 opt-ins in that case. So it applies to the two plaintiffs but not to the 79 opt-ins. The judge asked us to submit -- we have a renewed motion for Rule 23 class. The defendants have a motion for decertification.

And so Judge Sargus asked us to brief the issue of how the summary judgment ruling affects those. That briefing has been completed. And we have not heard back from the judge yet.

So the summary judgment is interlocutory at that point. And we have asked Judge Sargus to sever those claims out so we can take them up on appeal and just stay the reminder of the case while -- until The Sixth Circuit tells us the answer to the questions.

THE COURT: Understood. And he's taken that under advisement?

MR. JONES: Yes.

THE COURT: All right. Well, either the existence of a new exemption is a material different between this case, Hughes is not controlling, you may have a jurisdictional problem then with the Pennsylvania Class, or Hughes is more controlling than acknowledged.

So if the absence of that exemption -- if the absence of that exemption changes the entire outcome, then the Pennsylvania class may not be appropriate for supplemental jurisdiction.

MR. JONES: But it doesn't change the entire outcome. It removes an exception for any -- for a subset.

THE COURT: But there will be different class members in both classes. Won't that create a different body of distinct facts, what each members' letter said, for example? Unless they said the same thing. Whether guarantee was expressed in a different way.

Ms. Idalski has some of the letters or at least some of the letters that relate to -- and I assume you do, Ms. Piazza, if you can find them there.

MR. JONES: I mean, here's the thing with the letters Your Honor. What you'll see with the letters is anything prior to spring/summer of 2014 will not have -- won't say a thing about a guarantee or express a guarantee. The letter after then -- and they didn't all go out at once, they went out -- they trickled out. So you've got from April to June or July where these reclassification letters went out. You'll see the word guarantee in those.

And then any new employee, you know, after that, you'll see the word guarantee in those. But you know, and I say that just with very careful in looking at the letters that she shows you to distinguish between the ones prior to mid April of 2014 and those that come later. The only ones that you'll see that say the word guarantee are after the spring and summer of 2014.

THE COURT: Well, I understand that. But why am I prevented from interpretating those 2014 letters as merely clarifying Gulf Interstate's prior practice as that of a salary guarantee? That's a reasonable interpretation for the Court to make, isn't it?

MR. JONES: If you are making a finding of fact. Especially in 216(b), you can't make any merits determination? And under Rule 23, it's not a determination you are required to make. I mean, that issue is out. That is one interpretation. But there's an alternative interpretation, which is ours.

THE COURT: Well, just because one says guarantee and the other does not doesn't mean that one is a guarantee and the other is not.

MR. JONES: If the ultimate determination is that the guarantee doesn't have to be expressed in the employment agreement. Remember, there is the case law that says it needs to appear. Okay. Then you're right in terms of just because one says it and one doesn't doesn't mean as a matter of law.

But still you've got the whole fact issue of whether there is a guarantee to begin with. And this goes back, once again, to Ms. Kramer and her story.

So the only way you can get to where you just said you could get to is to make, in connection with these procedural motions, determinative factual findings that -- on a record that's not intended to make factual determinative findings. If we're going to --

THE COURT: The Court doesn't make factual findings at the Rule 23 stage? The District Court doesn't make factual findings at the Rule 23 stage?

MR. JONES: Only -- only to the extent necessary to determine whether the requirements of Rule 23 are met.

THE COURT: Well, the existence or nonexistence of a guarantee, it seems to me, is a necessary fact that I would make at the Rule 23 stage, isn't it?

MR. JONES: Absolutely not. That is the principal issue in this case. There is evidence way beyond what is in these procedural motions that go to that issue that needs to be considered before a factual finding can be made about -- you know, about something that is the principal issue in this case.

I also remind, Your Honor, that discovery in this case was bifurcated. That the only discovery we have done so far is for that necessary for the motions. And merits discovery hasn't even begun yet.

So the question of the guarantee is not one that has to be decided on Rule 23 because the question of the guarantee is the common question and the common answer. And that's all you have to determine on a Rule 23 motion.

THE COURT: And you think determining the question, the necessary fact, as I believe, of a guarantee, the existence or non-existence is going too far ahead?

MR. JONES: Absolutely.

THE COURT: Let me ask you this.

How many individuals would comprise the Pennsylvania Class, and would that number satisfy the circuit's recent decision, a decision earlier this year, entitled in re: Modafinil Antitrust Litigation, which is found at 837 F.3d, page 238. The court in that case, Modafinil, stated that a district must consider, quote, The ability of individual class members to pursue their cases through the use of joinder, end quote, particularly where the putative class does not exceed 40 members.

What do we have here?

MR. JONES: We have 146, Your Honor. I'll also note in the response that the defendant did not contest numerosity.

THE COURT: Let me ask you this. The briefs reveal a dispute as to the existence of a highly compensated workers exemption under Pennsylvania's Minimum Wage Act. Do the parties agree on that statement of the law; and if so, what other exemptions might apply under that Act?

MR. JONES: Okay. First of all, there is no highly compensated exemption under the Pennsylvania Minimum Wage Act. That's a -- that exists under the FLSA but not under Pennsylvania law. Other than that, the exemptions are the same as far as executive and administrative.

THE COURT: All right. Let me ask this again.

MR. JONES: Sure.

THE COURT: I am looking at your brief and I'm looking at Gulf Interstate's briefs. There appears to be a dispute between the parties as to the existence of a highly compensated worker exemption --

MR. JONES: Right.

THE COURT: -- to the Minimum Wage Act here in Pennsylvania.

MR. JONES: Right.

THE COURT: Do the parties agree on that statement of the law? And are there other exemptions that might apply under the Act?

MR. JONES: Are you saying do we agree that there's a dispute?

THE COURT: There appears to be a dispute. I'm looking at the papers.

Do you agree on that statement of the law, the existence of a highly compensated worker exemption under Pennsylvania Minimum Wage Act.

MR. JONES: I guess you'd have to ask Ms. Idalski about that, if they're going to take the position that there is one. Because the case law is fairly clear that there is not one, including the determination by Judge Fischer in this case.

THE COURT: All right. Let me ask you this. What would be the appropriate course of action were the Court to refuse Mr. Sloane on adequacy grounds? Isn't he susceptible to several challenges on both credibility and exemption grounds that interfere with his ability to adequately safeguard the interests of the class as a whole?

MR. JONES: There is several questions there. The first one would be if the Court were to determine that he was not an adequate representative, I think the case law is fairly clear that in that situation, the plaintiffs are given the opportunity to provide another class representative.

Now, what and you were asking about -- what was the second part of the question. Now, what -- what was the second part of the question?

THE COURT: Well, I think you have answered it.

MR. JONES: Okay.

THE COURT: Why did you pick a person who is apparently a three-time felon to be your class representative? Not to put too fine a point on it.

MR. JONES: At the time -- I understand. I guess the first answer to that question is we didn't know it at the time.

THE COURT: He's not the most savory choice for the Court or anyone else to digest, is he?

MR. JONES: I --

THE COURT: He didn't lie to you, did he?

MR. JONES: No. I didn't ask him, like they didn't ask him when they hired him. It didn't matter to them when they hired him. Plus, the fact that this is a man that has turned his life around since then.

And I think the case law is fairly clear that this -- someone's criminal background does not disqualify them from being a class representative unless the crime of which they are charged relates directly to the claim they are making. I mean, all of the crimes of which he was charged and convicted have nothing to do with whether or not Gulf Interstate properly paid its pipeline inspectors.

THE COURT: All that is true. But you know, unlike

Gulf Interstate now, you're going to put Sloane's credibility at issue under Federal Rule of Evidence 609, aren't you? That's a little different than hiring him to be an inspector of pipelines up in Wyalusing, Bradford County, Pennsylvania. I mean that's where we are now, in going forward with this case in this court, with a jury that might be sitting next door here (indicating).

MR. JONES: I understand that. And I think, you know, we can convince the jury that none of that has anything to do with the claims in this case.

THE COURT: Okay. All right. Lastly, let me ask you this.

MR. JONES: Sure.

THE COURT: Where is this action heading? What are the next steps that this Court should take, in your opinion?

MR. JONES: Rule on these two motions.

THE COURT: Well, I know that. But where are we going after that?

MR. JONES: That depends on the Court's rulings.

THE COURT: Where do you think it should go Mr. Jones?

MR. JONES: I'm sorry?

THE COURT: Where do you think it should go?

MR. JONES: Where do I think it should go? I think the Court should grant both of the motions. We'll have a period where people will have a chance to opt-in on the 216(b) claim. We'll send out notice to the Rule 23 class and give anybody a chance to opt-out, should they choose to do so.

We'll -- once we -- the opt-in period closes and we know what the universe of the FLSA class is, we'll complete any merits discovery, and at that point proceed to trial.

THE COURT: Okay. Good. Thank you.

MR. JONES: Sure.

THE COURT: All right.

Ms. Idalski, let's hear from you. I was going to break this up, but I thought it was, perhaps, easier to just hear from Mr. Jones on both of these issues.

MS. MS. IDALSKI: Yes, Your Honor.

THE COURT: Why don't we do them in this order, as well. Let's talk about the FLSA conditional certification first, followed by the Rule 23 issues.

MS. MS. IDALSKI: Sure, Your Honor. And I have a few points to address.

Plaintiff clearly can't show that there's a violation -- there's an inference of a violation of the FLSA. We've been hearing now from Mr. Jones for, what, three for four hours? He cannot show the Court that there's a violation of the FLSA. It is his burden to show an inference of a violation. He has not done that. And he can't do it because there is no evidence.

This is the second bite at the apple for the plaintiff. And they have less evidence in this case than they have in Ohio.

And I want to take you through specifically the Ohio case and just highlight the evidence that Judge Sargus had. So I'm going to do that in a minute.

But I want to go to the -- you hit the nail on the head. You just zeroed in on the key question here. A day rate means you get paid for days you work. That's what a day rate means. And a salary is a set amount that you receive every week whether you work or not. Okay.

And I'm not sure what kind of standard that Mr. Jones is trying to hold GIFS to. But those are the definitions of a day rate and a salary. Okay?

So the evidence shows, based on the payroll and Sloane's testimony, that he received pay for every day that he -- whether he worked or not, he received pay throughout every calendar day in six months. Okay. And you said, Mr. Jones, were there any days that Mr. Sloane did not work. So let me answer that question first.

Let me show that, Your Honor. Yes, the answer to that question is, "On July 5th" -- and you went right to the testimony, Mr. Sloane testified. "So yeah, period ending Friday, the date was actually Saturday. So Friday was the 4th. I worked half a day Friday at the job site and went to New York City that evening, because I remember we saw fireworks and then -- or did I -- I think I worked. Yeah, we saw fireworks in New York City, so I was off Saturday, July 5th, and then I go back on Sunday to the job site."

There is no holiday. There's no holiday on July 5th. I'm not sure where -- that's not in evidence. I'm not sure where Mr. Jones is getting that.

Okay. So if you look at Mr. Sloane's time sheet, he says he didn't work -- this is the time sheet that Thomas J. Sloane submitted to Gulf Interstate. He says he did not work on Saturday, and he worked a total of six days. This is the time sheet that his supervisor, Randy Groves, approved and turned in to Cathie Kramer in payroll. Yes, he worked Saturday and he worked a total of seven days. That's because he's guaranteed a salary. And he gets paid a salary every week whether he works or not. That's a salary.

I don't know how much more we can prove here. In 20 years I've never had a case with this much evidence at a motion for conditional certification stage. Typically two months after the case gets started, the plaintiff will file maybe an affidavit and have some evidence or allegation of an inference of a violation, and the Court has no other evidence to look at. So of course, the Court has to grant conditional certification, because there is no evidence to rebut.

Here we did six months of discovery. So be careful what you ask for. And now we have a complete record. We have three depositions from Sloane. We have time sheets. We have payroll -- we are not the just looking at pay letters anymore. And this hogwash about a guarantee has to be in writing is absolutely not true, and I'll go there next.

And I'll go to the case that Mr. Jones cited to you which does not say what he says it says.

THE COURT: I want you do that, but answer this first.

MS. IDALSKI: Sure.

THE COURT: What if Gulf Interstate gave him a holiday; does that make a difference then as to the day rate and salary basis dispute? So hypothetically, they give him a holiday; does that make a difference between the day rate and salary rate dispute, which I think everyone agrees is probably the heart of this.

MS. IDALSKI: No, Your Honor, I don't think it does. The bottom line is he was going to get paid for seven calendar days per week; whether it's a holiday, whether he worked it or not, he's getting paid. It just so happens here that this was not a holiday. It's not July 4th. It's July 5th. It's a Saturday. So there is no evidence in the record that this was a holiday. But no, it would not matter.

THE COURT: Go right ahead.

MS. IDALSKI: So the bottom line is, you know, then every employer in the country would be crucified then on -- just like you said, there is no requirement that a guaranteed salary be put in writing. And Judge Sargus is absolutely right. It's not what the pay letters say. It's what was actually paid. That's what the regulations say, too. It's the compensation received that the court should be looking at.

In fact, we cited to some cases, and I'll go through them, where courts say you know what, I don't want to look at your letter, I want to know what this guy actually got paid. Show me the payroll. Did you notice in the three to four hours that Mr. Jones gave his argument, not once did he mention payroll? Not once. That's what we use to prove these cases.

Let me just point out, too, because we went round and round what is a day rate, what is a salary, what is a day rate, what is a salary. The key case that the Plaintiff cites in their briefing is this Fenley case. It's a United States District Court Southern District of Ohio, Fenley versus Wood Group Mustang, where Mr. Jones's co-counsel Shannon Carson, and Ms. Piazza's firm, were able to get the court to grant nationwide certification on a day rate case.

So they present that to you and say Judge, this case is exactly like ours, see, we got nationwide certification in Ohio on this Fenley case. You should do the same here. This is a real day rate case. We have an exemption case here. We have a salary. In the Fenley case, okay, which this was really a day rate case, Your Honor, this is what you would have, and you would grant nationwide conditional certification.

And I'll read from the court's order. "WGM's overtime and additional compensation policy states that, quote, non-exempt, day rate Mustanger's receive a day rate that is inclusive of all hours worked including overtime." That's their policy. The day rate is inclusive of overtime. That's a violation of the law. You can't have day rate and not pay overtime. That, on its face, you can draw an inference that this was a policy that was applied nationwide to these people, and therefore, the court granted certification.

I don't know what we are missing. Since this case got started a year ago, our client is paying a salary. I mean, this poor company has just been dragged through the mud in two pieces of litigation here. This is now the second bite at the apple and our second argument here, and the case was transferred.

They are paying a salary. They're doing everything right. We're not asking you to make a merits decision. And Mr. Jones is right, you can't make a merits decision at this point in time. But you also can't ignore the evidence. The Court has to be comfortable that there's an inference of a violation of the FLSA with respect to pay.

All the Court has in front of it is a pay letter, quite frankly. And I'm going to go through these, too, because this is important for the Court to see. And stop me if I'm doing too much here. In their briefing they don't even talk about Sloane's pay letters; except in a footnote, and they use Mr. Hinkle, because Mr. Hinkle is like the Ohio case, which says day worked.

Mr. Sloane's pay letters say guaranteed day. Guaranteed. There is seven calendar days and then guaranteed per day. Well, because that sounds like a salary, counsel doesn't want to use those letters as examples to the Court. We went through this in detail with Judge Fischer.

So there is no violation of a pay policy in this case. Period. End of story. We don't even have to get into job description, which, by the way, counsel did not present any evidence on whatsoever, unlike Ohio, on job descriptions. There is no evidence as to what Sloane did in the motion for conditional certification or that Sloane's job duties on the compression station are anything like all of these other nationwide inspectors who are on pipelines. None. Didn't argue it at all.

So it should be a very easy decision for the Court, given the mountain of evidence that we have, because counsel wanted discovery before they filed these motions, which we fought. But we have been through now six months of discovery. It's been over a year and a half. And the Court has a mountain of evidence to look at.

And Mr. Jones wants to argue about whether or not we have a guarantee and thinks that it should be in writing with no authority to say that. So because of that, Your Honor, you should send out notice to 2,000 employees nationwide. This guy is a three-time felon who made $140,000 a year and worked for this client for six months. And we're having to go through this. I mean, this is -- it's a miscarriage of justice. It's a miscarriage of justice.

And with all of the evidence in front of it, I don't see how plaintiff's counsel can argue and be intellectually honest about this argument, honestly, with this kind of evidence. When you've got a time sheet where his own supervisor knew he was paid a guarantee and changed it and sent it into payroll, and the guy was paid every single calendar day that he worked for this company. And we're saying that this is a day rate? There is absolutely no evidence. No evidence whatsoever.

So if you look at Sloane's -- you already pointed this out, Your Honor. He made the exact same amount every single week, except for the first week and the last week, which under the regulations he does need to be paid for days he did not work during the first and the last week, and that is why he was not paid $5,404.

Here's an e-mail from Sloane that came out in discoverly. "Karla, I do not believe I was notified of this. I will try to get it done on Sunday, my day off." Admits he had a day off. Got paid for every Sunday. But oh, he was doing paperwork. How did Gulf know he was doing paperwork? They paid him for every single day. "We have been working 12 hour days, and I've had one day off in the last six weeks." Admits he had a day off. He was paid for every single day, regardless if he worked or not. That is a salary.

Okay. So our chart, and you may have mentioned this earlier, but there were days where he only worked five days at the actual compressor station, or six days. And if he was really paid a date rate, he would have been paid for those five days or he would have only been paid for six days. But he was paid for seven days, no matter what.

But counsel is saying because we didn't put it in writing, like counsel wants it to be, we should have just used that one word guarantee pre-2014, and because we didn't, then notice should go out to 2,000 people.

So at this point, Your Honor, courts have found that a salary basis can be inferred, and we have cited several cases for you finding a salary and not a day rate when the number of days plaintiff worked varied from week to week but their pay did not. "Plaintiff falls short of demonstrating that she was not paid on a salary basis. She does not allege that Guardsmark docked her pay. To the contrary, her pay slip for the week showed that she was paid for full salary by the company."

This is a good time to bring up what Judge Sargus had in front of him. Unlike you, Your Honor, Judge Sargus, actually had evidence where he could conditionally certify a partial class because judge -- at the time Judge Sargus was sitting where you are and was considering this motion, no discovery had been conducted, and the only thing he had were three pay letters that were exactly the same. The three plaintiffs worked on the same project and had the same pay letter.

We don't have anyone who had the same pay letter as Sloane in evidence. There is nobody that has pay letters like Thomas Sloane. Okay. And I'm going to show you all the pay letters in a minute to compare.

THE COURT: Let me ask you this. That e-mail may be a critical document. Does the Court have that by way of an ECF filing?

MS. IDALSKI: Yes.

THE COURT: Maybe your co-counsel could -- Mr. Hall?

MR. HALL: Yes, sir.

THE COURT: Yes. Maybe you or Ms. Saltz can locate that and just make me a reference. That was interesting to see that.

MS. IDALSKI: Okay, Your Honor. Let me finish Judge Sargus, and then I do want to come back to the July 5th admission and also that e-mail. You made me think of something else I wanted to bring up.

Not only did Judge Sargus have these three pay letters that were exactly the same, okay, but he also had affidavits from the three plaintiffs in Ohio and the affidavits stated that -- the plaintiff testified that there had been an improper deduction, that there had been deduction for sick time when there was no sick policy.

So Judge Sargus is now faced with okay, I have three pay letters that are all the same, and they are all alleging an improper deduction, and they all allege they perform the same job duties. So what Judge Sargus did is he conditionally certified just that MarkWest Ohio project. He didn't have the benefit of any other discovery or evidence or admissions like we have in this case. But there was no evidence of a nationwide similarity in pay letters or allegations of improper deductions.

You don't have that, Your Honor. You are looking at Thomas Sloane. You have -- quite frankly, they attached the pay letters to the brief, but they only mentioned Sloane's pay letter in a footnote. They focused on an opt-in, Hinkle. I'm not sure why he's not the benchmark for the analysis. It's Sloane. But we have no one who has a letter exactly like Sloane. And Sloane, as far as we all know, was paid for every day that he worked.

So who is similarly situated to Sloane? We don't have anybody. Plaintiffs have not shown anyone who was similarly situated to Sloane with respect to pay. Sloane was paid a salary. I'm not sure what else we can do to prove that Sloane was paid a salary.

Going to the slide about guarantees.

Guarantees need not be written. Okay. ACS versus Detroit Edison Company, where the Sixth Circuit said, "Finding guarantee, even though there was no writing, based would be affidavits and deposition testimony by relevant employees of the company, along with various employees time keeping forms, paystubs, and payroll department reports."

Exactly what we have in this case.

"Plaintiff offers no legal support for the proposition that the uncontested evidence contained in these depositions, affidavits and documents does not suffice to satisfy an employer's obligation to show its eligibility for the executive, administrative or professional exemption."

The case that Mr. Jones cited to you with respect to the teachers, Rodgers versus Basin School District, the plaintiff claims that this case requires that the guarantee be in writing. And it does not. Here's the quote from the case.

"The Court's determination flowed from the employee agreement and district policy 471, which identified plaintiff as a non-certified employee. And as such, under the master agreement, such employee's salary schedules are paid hourly."

That's what that case says. That case does not say that you have to have a guarantee in writing. And you don't. And the Court was right about that.

All right. Now, let me go back to Mr. Sloane. And the Court brought up the fact that there was -- that Mr. Sloane had a criminal past. And we mentioned in our briefing that -- in fact, we filed the motion to dismiss early on, because we didn't think that he was an adequate class representative. And Judge Fischer wanted to give the plaintiff a chance, because he said that he -- you know, he was a changed man and he had a alcohol and a drug problem and that he was no longer that person. So she have did give him the benefit of the doubt. Didn't want to dismiss the case early on.

And you know, if that's true, then he would be honest in this litigation, if he's a changed man. And if he's not honest, then we thought we would bring it up again at the Rule 23 motion with respect to adequacy.

So during Sloane's second deposition he gave inconsistent testimony about July 5th. Mr. Hall asked on June 22nd, 2016, "Did you work on July 5, 2014? Answer, July 5th 2014? Question, Yes. Answer, Yes. Question, Where did you work on July 5th? Answer, At home. Question, What did you do when you were working at the apartment on July 5th? Answer, Reports and stuff, going over drawings."

Then on September 25th, 2016 his answer changed, and this is when he said he did not work on July 5th. So we have conflicting testimony there on probably one of the most critical pieces of evidence in this case.

There's a couple of other points I want to just hit, Your Honor, for you. And then I didn't show you Randy Groves's declaration. This is the supervisor of Sloane. He's the chief inspector on the 319 project. He knew that Sloane was to be paid a guaranteed salary. And he submitted the declaration testimony here. He's familiar with how GIFS inspectors on that project, including Mr. Sloane, were paid.

"Mr. Sloane received a guaranteed salary each week that was calculated by taking a certain set amount and multiplying it by seven days. Mr. Sloane was paid that full salary whether he worked all seven days during the week or not. There were a number of weeks during the Station 319 project when no work was done on Sunday.

"Because the inspectors were guaranteed seven days' pay each week, however, they got the full amount of salary even in weeks where we did not work on Sunday."

And you have Mr. Groves intercepting Mr. Sloane's time sheet and then changing it and sending it to payroll. And that's how the process worked.

THE COURT: Again, that declaration, Groves's declaration, is that part of an ECF filing?

MS. IDALSKI: Yes, it is.

THE COURT: If you would point that out to me at some point.

MS. IDALSKI: Sure. And the e-mail you asked me about is document number 182-18. It's an exhibit to Sloane's deposition.

So one thing we haven't talked about today is what standard applies at the motion for conditional certification stage. It is the defendant's position that the lenient standard no longer applies. The case law is pretty clear on that.

Judge Sargus applied the lenient standard because no discovery was conducted. At that point if -- that's why 95 percent of the time when plaintiffs file these motions for conditional certification they are filing them before discovery, shortly after their complaint. And 95 percent of the time courts routinely grant them. Because there is such a lenient standard, we have to go based on what the plaintiff is saying.

Now, okay, but if discovery is conducted before filing the motions, a more stringent standard applies. So again, it's a be careful what you ask for situation.

And here, we have even -- initially we had the payroll, which showed that Sloane received the same pay every day, every calendar day. And during the six months of discovery after deposing him several times, because of withholding documents and the like, that's why there were three depositions, he made some pretty critical admissions.

So plaintiff's counsel would have you ignore all that evidence and focus on the fact that there is not a guarantee in writing. And because there's not a guarantee in writing, and because it seems odd that Cathie Kramer would not have something in waiting in the payroll department, therefore, the Court should make an inference of an illegal FLSA policy with respect to pay, which Your Honor, that's just preposterous in light of all of the other evidence that points to the fact that this man received a salary.

So here we had 17 declarations. I believe they are all in evidence. We had six depositions of Cathie Kramer, Bob Sprick, who is here today, the vice president -- the senior vice president. We had Andy Neuberger and we had Sloane's three depositions. We had a total of six months of precertification discovery and more than 11,000 documents produced between the parties.

We had none of that in your typical conditional certification motion when the motion is decided.

So what level is evidence is required? We're past the modest factual showing. And most courts -- we cited to the Creely case, which actually has a good analysis from the court -- several different courts as to what should the standard be at this point. If there is extensive discovery conducted, the plaintiff has to make a modest plus factual showing, not just a modest showing. And courts are pretty clear on that. We're not at the preponderance of the evidence standard.

The court did bifurcate discovery. Judge Fischer did bifurcate discovery. But quite frankly, so much discovery was conducted in the last six months I'm not sure if there is any necessary discovery necessary to be done conducted going forward. I think the factual record is complete. It appears to be, for the most part, complete.

So courts say look, we're not going to ignore evidence. If you did discovery, don't come in and tell us that we should grant your motion based on affidavits. It would be -- you would have the absurd result of granting the parties time of due discovery on the conditional certification question but subsequently imposing no incremental hurdle in determining whether plaintiffs may send opt-in notices.

The court should compare plaintiffs allegations set forth in their complaint with the factual record assembled through discovery to determine whether plaintiffs have shown some progress as a result of the discovery as measured against the original allegations and defenses. How much the progress plaintiffs have made will be considered in conjunction with defendant's evidence.

So the court can't ignore the evidence in the record. It has to look at plaintiff's evidence and defendant's evidence in drawing its conclusions. So we have several courts listed here that have imposed this higher burden when discovery is conducted.

And the other point I wanted to make, but I think I have already made it, is that this is an exemption case. It's not a day rate case. Fenley is a day rate case. Where everybody agrees that a day rate was paid, that on its face it appears to be potentially illegal, because you can't have overtime included in a day rate, generally, unless you have a below contract, and that is in writing.

But generally, that's the kind of policy you see in a day rate case when courts are conditionally certifying them. You don't see a salary and the plaintiff wanting to turn the salary into a day rate based on the assertion, the just absurd assertion, that the guarantee has to be in writing. Because it's not in writing, therefore, it must be a day rate. And it's defendant's burden to show because it's not in writing they actually paid a salary. That's not the standard. And that's not the burden of proof on a motion for conditional certification. So I'm not going to go through that.

But the question for the Court today is has Sloane carried his burden of showing that he is similarly situated in terms of both pay and job duties when there is no evidence of a uniform, potentially unlawful pay practice. If Sloane can't show an inference -- he doesn't have to prove it -- but an inference of an unlawful pay practice as to himself, how is he going to show it with respect that he is similarly situated with respect to the class? We don't even get there. We're not even close to getting there.

Then with respect to job duties, we have no evidence of Sloane, who worked on a compressor station not a pipeline, that he did the same job duties as this nationwide classes of all different types of inspectors. We have no evidence whatsoever in the record on the motion for conditional certification.

The only argument you heard today, Your Honor, was Mr. Jones telling you what the Department of Labor regs say generally about inspectors, not even pipeline inspectors but generally inspectors are not exempt employees based on their job duties, is what he was telling you. But he has to do more than that.

He actually has to show that Sloane -- you have to look at the facts in this case, not in talking in general terms, but look at the facts of this case and show how Sloane's job duties are similar to the class that he seeks to represent. We have heard no evidence on that at all.

In fact, there was such an absence of evidence that Judge Fischer issued an order for defendants to produce job descriptions prior to our hearing. Okay. And so defendants did produce job descriptions and plaintiff said -- Mr. Sloane said I didn't do these duties. GIFS came up with those job descriptions after this case began, and all of those job duties listed are really exempt job duties and I'm not going to agree that I performed them. Okay.

So you can't have it both ways. So there's no evidence that he performed job duties like anyone else. He has not met his burden of proof; far from it at this stage.

I'm just going to skip through some of these slides that we have already covered today. The Court is well aware that salaries can be computed on a daily basis. Mr. Jones even discussed that.

So what we have in this case, like I said, and never had this much evidence at a motion for -- on a motion for conditional certification, on the defense side as we have here. It's just absolutely overwhelming.

THE COURT: Let me ask you this, if I may.

MS. IDALSKI: Sure.

THE COURT: Did Gulf Interstate ever pay its workers overtime?

MS. IDALSKI: No, it did not, except for in California. They're treated differently.

THE COURT: Were there discussions as to overtime being included in the day rate, as you might have in Fenley, for example?

MS. IDALSKI: No. At all times Gulf Interstate paid their inspectors a salary calculated by the day. And that's what the evidence shows in this case. The deposition of Bob Sprick clearly shows that. He goes through, and in excruciating detail, that these inspectors were always paid a salary, that's it's calculated by the date.

Cathie Kramer's deposition specifically states that. And one 'gotcha' that the plaintiffs have -- Plaintiff Sloane has pulled out here is Cathie Kramer saying -- again, it's semantics. She was explaining how the salary is calculated by the date, and she said the word day rate. So you'll see that quote out of context. Mr. Jones brought that up today. And you'll see it in the briefing. But we have the whole clip here.

But if you read Ms. Kramer's deposition, it clearly states that these individuals -- how they were paid. They were paid a salary. It was guaranteed. It was calculated by the day.

So what you have, Your Honor, it is the timing, plus the evidence clearly shows that the Court should reject this day rate myth. The evidence that we have are the payroll records, the time sheets, Sloane's three deposition transcripts, the deposition of GIFS executives and 17 declarations between the parties. We have payroll and time sheets showing same pay every week, regardless of days works.

We have Sloane's testimony. He had days off but he's still paid. We have supervisor testimony where the supervisor is changing the time sheets to reflect the guarantee. I mean, honestly, I don't know how much more evidence we can have in this case.

Here is a -- Sloane's pay letter, his April 11th, 2014 pay letter. It shows that we have highlighted salary. Okay. That's right on his pay letter. It says salary. And then it says $386 per calendar day. Okay. I know Mr. Jones pointed out, as approved by the client. And Mr. Sprick testified, you know, exactly what that meant in his deposition.

But the bottom line is Mr. Sloane, if you look at the payroll, was paid for every single calendar day and he was paid a salary. So there is nothing inconsistent about this.

And the Court understands the calculations, so I won't go through that.

You can't look at these letters in a vacuum. You should look at the payroll. Again, as plaintiff won't mention payroll in all of their briefing and all of their argument, even though, as Judge Sargus said, and Judge Sargus did get it right, and The Sixth Circuit, is very clear on this, it's the payroll. It's the evidence of how they were actually paid that matters, not a letter or not some other extraneous evidence.

Now, Judge Fischer also pointed out in her last opinion to -- when she was transferring the case -- that some of the time sheets that Sloane submitted indicated he worked less than all seven days during a particular week, Gulf made adjustments to those time sheets prior to sending them to Kinder Morgan, reflecting that he worked ten hours every day that he was assigned to the client. Which clearly, she recognized look, we ensured that this guy was being paid the same amount whether he worked or not.

And we have Sloane's testimony, which I have already gone through, where he had days off where he didn't work where he was still paid. Typically what you would see in this case is the plaintiff saying employer, I wasn't paid a salary. You took all of these deductions from my paycheck. Now, I wasn't paid for all of these days when I was off. If I was really receiving a salary, I would be paid the same amount every week and you wouldn't be deducting from my pay, and then the plaintiffs' attorneys attach the payroll or the pay stubs or the time sheets to their complaints. And that is some evidence of an inference of a possible unlawful deduction where you would grant a motion for conditional certification.

Again, this is not that case. We don't have that here. So what you do have is you have uniform testimony of a salary. You have uniform testimony of a legal pay practice. What Mr. Jones and the plaintiff have to show is that there is uniform testimony of an illegal pay practice, that there's an inference of an illegal pay practice with respect to Mr. Sloane and that similarly situated to other class members who also have a potentially -- are subject to a potential illegal pay practice.

We have the opposite here. We have everybody testifying to a legal pay practice.

Mr. Sprick, who is senior vice president, "At all times it has been, and it is GIFS's practice, to pay its inspectors a salary based on a set amount multiplied by a guaranteed number of days per week. This guaranteed salary is explained to each inspector upon his or her hire with GIFS in both a pay letter and a discussion with the inspector. Client approval of a time sheet is not a prerequisite to an inspector being paid his or her guaranteed salary."

Andy Neuberger. "Whatever the number of days is, all inspectors, other than those working on the three projects that we had identified, one of which was California, Gulf Interstate's position is that they are paid a guaranteed number of days per week. They are paid a salary based on a guaranteed number of days."

Cathie Kramer. "It's based on a guaranteed daily structure. The pay structure is per day for a guaranteed number of days per week. It's a guaranteed amount per week. It's based upon a guaranteed number of days per week. We have a rate that we pay them by day times a number of days in their guarantee, per their pay letter. It is a guaranteed amount structure by days. They're both -- they are both guaranteed for seven days. It's a weekly rate."

Mr. Jones asks, "It is stated as so much per day in the pay letter. Correct? Answer, For seven days a week, which equals a weekly rate."

I'm not sure what more Cathie Kramer can say.

In addition to all of the evidence in this case, we have evidence from the Hughes case. So we already have one district court judge saying yes, I have looked at the payroll; these people are being paid a salary, the payroll is what controls. Not only did he not grant a conditional certification on a nationwide basis, but he refused to grant the class certification under Rule 23. And then he granted summary judgment that these individuals are paid a salary.

I know this is not before this Court right now but the Court again can't ignore the evidence. I mean, there's comity. The Court has to -- you know, it's before the Court. And all of this should be taken into consideration.

So again, and I know we are beating this to death, but I know we had a lot of discussion on it. If you have a day rate, okay, you have weekly pay that would fluctuate. That's the whole point. You don't get paid for days that you are not there.

The actual evidence here is we have the same pay every week. Again, we're only looking at Sloane. Is everyone similarly situated to Sloane. If there were day rates, Sloane would have testified he wasn't paid for days he worked. Here he admits that he was paid even when he worked. Okay. So that's our actual evidence.

If there were a day rate, the supervisor would not change Sloane's time sheets from six days to seven days worked. Okay. Here, we have a supervisor actually going in and changing this time sheet because he knows that his inspectors all have a guaranteed amount of pay. If there were a day rate, you wouldn't have every -- all of the supervisors at GIFS saying that we have a guaranteed salary here. So you've got uniform testimony from the supervisors.

Hall versus Guardsmark. This is a Western District of Pennsylvania case. "Court does not review plaintiff's evidence in a vacuum. It reviews plaintiff's evidence in light of the evidence submitted by defendants."

All right. So plaintiff's whole case ignores all of this evidence. And they focus on select pay letters. And Mr. Jones didn't show you any of these pay letters today. But in the briefing this is what the plaintiffs argue to the Court. And in our hearing before Judge Fischer, we talked about these pay letters.

And I think they are important for the Court because, you know, Your Honor, it's correct you can't make a merits decision right now, even though you probably could because you have so much evidence.

But what you are to do, according to the case law, is to say okay, first, is there an inference of a violation of the FLSA. And second, is this individual, Sloane, similarly situated to other employees, based on pay letters, based on how he's being paid, based on the job duties that he's performing.

So here, what we have is -- and we'll go through these pay letters, and we also have hard copies for the Court, if the Court would like them. Sloane selected certain pay letters in his briefing. And he focused all of his argument on Hinkle's pay letter, not his own. The reason is because is Hinkle's pay letter looks more like a day rate than Sloane's pay letter. So he presented the -- the plaintiffs presented only half of Hinkle's pay letters, though, and then they ignored the other half. So they cherry picked out the evidence that looked more like a day rate. We're trying real, real hard here to show that there is some kind of day rate, like in February in Fenley. This is not that case.

The plaintiffs ignored any opt-in letters and didn't present them in their argument to the Court. They attached some of them, not all of them, that had a guarantee, that said anything about a guarantee.

So what you have is Hinkle's pay letter here on the screen; August 13th, 2012. It says salary $267, day worked. Sloane's pay letter says, salary $387, calendar day, as approved by client. So what sounds more like a day rate? Calendar day or day worked? Well, day worked does.

So let's present Hinkle's pay letter. But this is not a case about Hinkle. Hinkle is just an opt-in at this point, and he's not the benchmark. Sloane is the benchmark. But this proves that they don't have common pay letters. You've got different rates and you have got different projects. They didn't work on the same projects. They didn't have the same supervisors. They don't have the same rates. One says day worked. One says calendar day.

If you look at Hinkle's pay records, though, which were produced during discovery, that plaintiffs insisted that they needed to have but never brought them up in all of their briefing or in argument, he was paid the same amount every week, which also shows that it looks like he's been paid a salary. He's been paid a guaranteed amount, just like the supervisors testified would be the case except for the first week and the last week.

So here is another pay letter that was produced by the plaintiffs, $362 for day worked. This was March 3rd, 2013. If you look at payroll again, even though it says day worked, it looks an awful lot like a salary. It's the same amount every week. All right. Plaintiff's selective pay letter number three, October 24th, 2013, $419.95, day worked.

You look at the payroll records and he's paid pretty much the same amount every week unless he worked more days. Then he is paid more. There were some time off for the Christmas holidays. The regs say that if someone is out for a week or more, they don't need to be paid. These are all lawful deductions, the ones that are shown because he was not there. That is what plaintiff shows you; not the payroll, just the select payroll pay letters. They don't talk about Sloane's pay letters again. They talk about Hinkle.

So if you look at the whole truth, we've got Hinkle's pay letters omitted by plaintiff. Okay. If we're going to show Hinkle's pay letters, why not show all of the letters? Well, because one says guarantee and we wouldn't want to have a guarantee because that looks too much like a salary. So we're only going to present half the story to the Court.

It says, fixed salary $348 a day, guaranteed six days per week. Another letter that was omitted from Hinkle. Fixed salary, $355 a day, guaranteed five days per week. Another letter for Hinkle that was omitted by the plaintiff, fixed salary, $355 per day, five days per week.

As you can see, Your Honor, these pay letters are all over the place. Even if you don't consider the fact -- if you want to ignore the payroll, like plaintiffs want you to, even if you were to just consider these letters, they're not the same. They are not the same. They're all different. Some are guaranteed. Some are guaranteed five days a week. Some of them are day worked.

Judge Sargus had the exact same pay letters for those three plaintiffs on the MarkWest project, and that's why he conditionally certified that class. And he had the deductions argument.

You have no evidence in front of you of any common pay practice of anything that Sloane is similarly situated to any of these opt-ins. There's five opt-ins. This is Hinkle.

Not to mention -- I don't even think we get there, because we haven't established an inference of an illegal pay practice in the first place with respect to Sloane. Because now there is too much evidence that you have to look at because of all of the discovery that was done in this case.

So the whole truth is now we look at opt-in Stapleman's pay letters. Okay. His pay letters say -- and these were not mentioned in the briefing of the plaintiffs -- that he received $446, guaranteed seven days per week; $337 based on a seven-day workweek; 330 based on a seven-day workweek. These weren't mentioned because one clearly says there you go, you want to have a guarantee in writing, there you have it with Stapleman, guaranteed seven days per week. Seven-day workweek, that looks like a guarantee. As you can see, all of these pay letters are different.

If you don't believe, which is not even the right standard here, they are not the same. All the pay letters are different.

Stapleman's pay letters again, here they are. Each one that I just went over. LaLonde, his pay letters, they all say guaranteed. He's one of their opt-ins. He's guaranteed -- if anything, he received a guarantee like Sloane. So they do have a guarantee which means they are being paid a salary, which means there is no illegal pay practice. So the ones that are similar have a guarantee and there is no illegal pay practice.

So plaintiffs just -- there is too much evidence now. They can’t -- it's too late for conditional certification on a lenient standard. We have to look at all of the evidence now. And all of this evidence points to the fact that there shouldn't be conditional certification. It would be a travesty to send out notice to 2,000 people, or five people for that matter, in light of this kind of evidence.

Here are the pay letters. Guaranteed five days a week, LaLonde. Guaranteed five days per week, LaLonde. LaLonde, February 11th, 2015, 425 per day up to 12 hours, guaranteed five days per week. 42.50 is an additional compensation over 12 hours, as approved by the client. $400 a day up to 12 hours, same thing. This is June 2nd, 2015. Okay.

So Sloane's pay letters have a guarantee confirmed by payroll. We have two letters for Sloane; the April 11th, 2014 pay letter provides for pay every calendar day, as approved by the client. Calendar days are as guaranteed as the sun coming up. Client approval was not a day-to-day approval but merely overall control of the project.

Sloane's June 17th, 2014 pay letter contains an express guarantee. Being at the job site meant being in Wyalusing, and it did not mean going to the trailer. Sloane was paid for numerous days that he did not go to the trailer. Here is Sloane's June 17th, 2014 pay letter, which is in a footnote in plaintiff's briefing on the motion for conditional certification.

There's a lot of discussion about pay letters. Okay. If that's all we had to go on, and they were all the same, and they didn't say guarantee, and there was no other evidence, maybe you would do what Judge Sargus did. But at the end of the day, that's not what you have in front of you now. And we know that Judge Sargus has ruled, it's not written descriptions of the payment policies that were relevant to the salary basis test inquiry but rather the actual payment practice. Here, there is no dispute that plaintiffs were actually paid the requisite amount to satisfy the FLSA's salary-basis requirement.

So we have no one who is similarly situated to Sloane in terms of pay. Similarly situated means that one is subjected to some common employer practice, that, if proved, would help demonstrate a violation of the FLSA. It doesn't mean that there's a common practice that if proved is legal, like a salary.

So Sloane can't show any part of the standard. He was paid a salary. He admits he was paid for days he did not work. The payroll records show the same pay every week. We don't have any evidence of a common practice that would violate the FLSA.

So at the end the day, Your Honor, what you are left with is this allegation of a day rate policy that Mr. Jones said that the guarantee should have been in writing, is required to be in writing, with no authority to back that up. And that this case is going to rise and fall as to whether or not the jury believes Cathie Kramer. That's the evidence that he has presented to you today.

The District of New Jersey denied conditional certification under similar circumstances finding, "No factual basis to support the inference that employer has the company policy that plaintiff claims. Plaintiff provides no factual foundation for his statement that employer policies mandated that loan officers not be paid overtime. This appears to be a conclusory allegation and in the absence of any supporting factual assertions, it does not allow this court to infer the in existence of a company policy that would be expected to result in a class of similarly situated loan officers."

Okay. So that's what we have with respect to pay.

You have nothing. Nothing was presented to you today that would allow you to be able to infer that there is a violation of the FLSA with respect to Plaintiff Sloane. What we have here is we have a salary basis. And again, I don't know how much more evidence we can have.

In addition, Mr. Sloane has to show that he was similar with respect to the class with respect to job duties. And what we have here is the motion -- there was not an affidavit attached to the motion for conditional certification with respect to the job duties that Sloane performed. Okay. Again, Sloane's different. He's at a compressor station. He's doing something totally different.

And so that was their choice to ignore job duties. They argued DOL regulations. They have argued generally that inspectors shouldn't be exempt. That's not enough. Judge Fischer saw that there wasn't anything there and ordered job descriptions, which we were shocked that she was actually trying to help the plaintiffs. Then they disavowed the job descriptions.

Okay. So at first, plaintiff said look, we don't have to prove that we have similar job duties. You know, all we need to prove is that there's a day rate. And they were banking on the fact that by using semantics, by using the term day rate, by showing selective pay letters that said day worked, that no one was going to notice. Maybe the Court was going to be too busy, maybe defense counsel was going to be too busy to pick up on it and they would slide on through and get a rubber stamp and get this thing conditionally certified to 2,000 people. There was just no evidence, and we argued that in our response.

But what you have here, and the Court already said this today, and I just want to reiterate it again, is that these job duties are individualized. What you have is different clients all across the country who are supervising these inspectors. So they have different supervisors, different locations, different clients with different sets of rules. Some of the clients had their own job descriptions. Some are compressor stations. Some are pipelines. They're not similar.

You would literally have to -- it is so individualized that you have to look at what each of these people are doing. We don't have evidence like we had in the MarkWest Ohio project where the plaintiffs said we all do the same thing. It was easy for Judge Sargus; they all do the same thing, so at this lenient state, I am going to just certify the MarkWest Ohio project because I have evidence that they are similar on the same project with the same supervisor.

The problem with different supervisors, and even Sloane admitted this in his deposition, is that they allowed different levels of discretion and independent judgment, which is one of the things that has to be -- one of the proofs for these exemption. So if you have a supervisory chief inspector and he's never there, and he's going to let you take control of the project, you are going to have more supervision and discretion than maybe some other inspectors.

So I mean, that's going to be key here, as well.

So there are plenty of courts, Your Honor, that have not granted conditional certification. Okay. We have listed them all. Because I think a lot of courts are so used to just, you know, granting conditional certification, and it does happen most of the time.

This is not that case. This is a very unique case. Like I said, in 20 years I have not had a case with this much evidence. It's true most of the time conditional certification is granted. But not here. Not when you have six months of discovery and now the Court -- there is no longer this lenient standard, but there is this modest plus standard, and you have all of this evidence where you can't infer -- there is no proof. There is no inference that can be drawn because it's a clear case of evidence -- okay. We're not asking you to make a merits decision. You have to be careful there. But there's evidence of a salary.

And you already have a district judge in Ohio who looked at the exact same issue with the same payroll and is saying they were paid a salary.

So you're in a very unique position. This is not like every other case. And we strongly submit to you that you should deny this motion for conditional certification in their entirety, because quite frankly, it's frivolous in light of all of the evidence that we have.

Your Honor, that's all I have on the motion for conditional certification.

THE COURT: Would you like to talk about Rule 23 certification?

MS. IDALSKI: Okay.

THE COURT: Before we get into that, I think it's an opportune time for a short recess. Why don't we pick up where you left off at about 4:00.

MS. IDALSKI: Okay. Great.

THE COURT: The Court will rise.

(A recess was taken from 3:50 p.m. to 4:03 p.m.)

THE COURT: Mr. Hall, you are going to tackle the Rule 23 issues?

MR. HALL: Yes, sir.

THE COURT: Go ahead.

MR. HALL: Before we get started on that, though, I wanted to clean up one issue. The docket number for Mr. Groves's deposition, which we showed you in the presentation earlier, is docket number 182-17.

THE COURT: Right before the e-mail from Sloane?

MR. HALL: That's correct.

THE COURT: Thank you.

MR. HALL: If it would be of assistance to the Court, we do have hard copies of the pay letters for Mr. Sloane and the opt-ins. Happy to offer it up.

THE COURT: Hand it up to Mrs. Hitesman, if you would, please.

MR. HALL: Of course.

THE COURT: Thank you. Go right ahead.

MR. HALL: Rule 23 certification, Your Honor. Given what Ms. Idalski just showed in regards to Section 216(b), conditional certification, which is a much lower standard, this should be a pretty easy call. Because the plaintiffs are not able to meet 216(b), they are not going to be able to show that they can meet the much higher standard of Rule 23.

So the issue here on 23 where there is one certification decision unlike a section 216(b) is have they met their burden of showing. And they do have to show it at this stage, by a preponderance of the evidence, that they have satisfied -- not merely that they can in the future -- but have they now shown that they have satisfied all of the requirements of the 23(a) and 23(b)(3), and in particular the elements of typicality, commonalty and predominance, which are analyzed together in The Third Circuit, and adequacy.

So taking each of those first, and I'll go through them in order. First is typicality. Has Mr. Sloane shown that his claims are typical of the class when he was paid a salary but the class claims to have been paid a day rate? No. He's bringing a fundamentally different kind of claim than the class. He is paid a salary. They claim to have been paid a day rate. They're not typical claims.

Second, commonality and predominance. Have they shown that common evidence -- and you have cited the language of Wal-Mart versus Dukes -- it's not the raising of common questions but it's the ability to generate common answers. Do we have common evidence that will prove -- that will give us the answers about day rate and job duties for all of the class members in one stroke? And the answer to that question is also no.

Individual payroll records, as Judge Sargus found, are what is going to control the issue of question of how was each person paid. They have some pay letters, and we have seen the pay letters differ. So there is no common evidence there. The payroll, in the course of conduct in terms of how the parties actually behaved during the employment relationship, is going to tell us whether it was a salary or a day rate. And we have to look at that individually for each inspector.

When you look at it individually for Mr. Sloane, you see that it disproves this day rate theory, because you see that he was paid for days that he did not work. Then when it comes to job duties, they have put some declarations in on job duties at this stage under Rule 23. The problem is those declarations don't answer the question for all class members at once.

Because we've put in declarations from other class members who have said my own job duties and the job duties of other inspectors differ from project to project, from supervisor to supervisor, from client to client. So whatever the similarities they have shown, there are differences in the class, and there is no way to get common evidence, answering the question of what are the job duties in one stroke, as would be required for predominance under (b)(3).

Then last, Mr. Sloane's adequacy. Has he carried his burden of showing that he is adequate when he is going to be subject to cross-examination on unique issues that are personal to him that will distract him to the detriment of the class?

Mr. Jones earlier said well, we feel we can tell the jury that his past criminal history doesn't matter, and we feel like if we can convince the jury that he wasn't lying when he gave two different stories about what he was doing on July 5th...maybe they can and maybe they can’t. But that's all time spent focusing the jury on Mr. Sloane individually and not focusing on the claim. That's what makes him an inadequate class representative. At this stage, again, the plaintiff bears the burden of proof.

As Your Honor pointed out, the Court does have to resolve factual and legal issues at this stage, to the extent they are relevant to the Rule 23 analysis. That's true, even if they overlap with the merits. So even if the issue you have to decide at Rule 23 is an issue that would eventually, if made on summary judgment or if made in a different context deal with the merits, that's no reason to avoid making the tough decision now and saying, for example, there is no evidence of a day rate here.

So when you are looking at Rule 23, you are examining it through the lens of the underlying exemption claims. And as Your Honor pointed out, two different exemptions here. They are different from the FLSA in that under Pennsylvania law there's a long test and a short test. If you make over $250 a week, which Mr. Sloane, making over $140,000 a year, clearly was, you go to the short test. And if it were the executive exemption that applies, you ask is his primary duty management, does he customarily and regularly direct the work of two or more other employees.

You don't ask the question you would ask under the FLSA, does he have the authority to hire and fire, or are his recommendations with respect to hiring and firing given a particular weight. That's an element in the FLSA that's missing from the Pennsylvania executive exemption.

Under the Pennsylvania administrative exemption, likewise. Once you get above $250 a week, a short test applies. You ask is his primary duty office or non-manual work directly related to the general business operations. It's the same as the FLSA exemption. And then is the primary duty, does that include work requiring discretion and independent judgment. It's missing the language with respect to matters of significance, which exists in the FLSA.

So while we have ostensibly executive and administrative exceptions under both the FLSA and under Pennsylvania law, they are not precisely the same, although concededly, they are very, very similar.

So in analyzing Rule 23 through the lens of pay in job duties, sort of a dual inquiry under Pennsylvania exemption law, first we ask ourselves has Mr. Sloane shown that his claims are typical of the class. And the typicality analysis focuses on similarity of the legal theory and the legal claims, similarity of the factual circumstances. And then it also -- this is where technicality overlaps with adequacy. Is he going to be subject to unique defenses. And I'll address that in the adequacy.

But it's also a proper question under the typicality analysis, as well. The answer is no, he has not because his claim is fundamentally different from the classes. He says I was not exempt. But we can see he was paid a salary. Which means he either has no claim at all or his claim is my job duties don't make me exempt.

But that's not what the class is claiming. The class is claiming we were paid a day rate. So if Mr. Sloane was paid a salary and the class is claiming they were paid a day rate, these are not legally and factually typical claims, and they have not satisfied the burden under Rule 23.

At this point, as Your Honor mentioned earlier, this is where the factual determination of what kind of claim is Mr. Sloane making comes into play. And that question has to be answered in view of all of the evidence that's been presented to date, including the payroll records that show Mr. Sloane was paid the same amount every week, including the pay letter he received that says he is guaranteed to be paid seven days a week and the testimony from his supervisor and everyone else at Gulf Interstate that says we pay inspectors like Mr. Sloane a guaranteed salary.

So when the plaintiff tries to explain why Mr. Sloane's claim is typical, they say, look, what typicality is about is will a merits determination on the named plaintiff's claim resolve the claims of the class. To use their phrase, as goes the claim of the named plaintiffs, so go the claims of the class. Well, that's what they argued in Hughes, the exact same claim, until the named plaintiffs in Hughes lost.

And now they have gone to Judge Sargus and said wait a second; the fact that the named plaintiffs in Hughes lost on the merits at summary judgment does not mean anything with regard to the rest of the class. They say, The court's grant of summary judgment against the named plaintiffs on grounds of the salaried basis test does not answer even that question as to the remainder of the class. The court's ruling focused on the time and payroll records of Hughes and McDonald alone. The court did not examine any of the time and payroll records of the remaining 78 opt-in party plaintiffs."

If a merits determination at summary judgment as to the named plaintiff does not determine whether everybody else was paid a salary or a day rate, then those claims are not typical of each other. There is no efficiency to be gained by trying this as a class action.

The next element, commonality and predominance, which as Your Honor knows, under Third Circuit authority, are analyzed together.

They have argued that common issues will predominate in this case, because they say pipeline inspectors were paid on a day rate and not a salary basis. And so they say the common question is, is there a written guarantee in the pay letters. That's a common question, but it can't be answered without looking at each individual pay letter to see whether there's a guarantee or not.

As Your Honor saw, some letters have an express written guarantee and some do not. Even then, and as Judge Sargus noted, the existence of the word guarantee does not flip the switch from salary into day rate. With everything else remaining exactly the same, the word guarantee, according to Mr. Jones, changes from a violation of the law to no violation of the law, with everything else exactly the same.

I submit to you that that is not what the FLSA meant or was intended. It's not a 'gotcha' moment where an employer forgets to use the word guarantee and their entire payroll structure then becomes violative of the law.

As Judge Sargus looked at it, he said look, it's not the written descriptors of the payment policies that are relevant at the salary basis test inquiry. I'm focused on, rather, the actual payment practice. I want to look at the course of conduct.

We put a slide up earlier. Your Honor cited the Stein v Guardsmark case. There are -- we put a Fifth and a Seventh Circuit case up on the slide earlier. Other courts, likewise, in the context, albeit the fluctuating work week analysis, to the course of conduct of the parties to infer, is there a salary or not. And there is no reason that you can -- you could not infer that here in the salaried basis, section 541.604 argument or analysis, where you could clearly infer it under the fluctuating work week. It's exactly the same inference from the course of conduct.

Judge Fischer, when she transferred the case here, she made note of the evidence that had been submitted to her at that point on conditional certification and the plaintiff's motion for Rule 23 class certification.

She noted that Gulf's pay records indicate that Sloane was paid the full gross amount of 2,702 for every week of his employment and that his gross pay did not meaningfully change before and after that guaranteed pay letter.

So if a guaranteed pay letter comes out and it says you are guaranteed to be paid seven days a week, and the testimony has been we've always guaranteed it, this is exactly what you would expect to see.

Their argument -- and Mr. Jones called it a reclassification letter. That's not what it was. We didn't change anything by sending out the June 2014 pay letter to Mr. Sloane. We simply confirmed what Mr. Jones and his law firm had been misinterpreting as a day rate. They came in and said your letter doesn't say the word guarantee. We said well, fine, we've been paying a guarantee. So if you want us to write it down, we will.

As Judge Fischer noted, that didn't change a thing in terms of how Gulf paid its inspectors. It has always paid a guarantee.

Ms. Idalski noted upfront, guarantees do not have to be written down. There is no case law that says the presence of a written word guarantee versus its absence makes a night-and-day difference in terms of the violation of FLSA. And as Ms. Idalski went through the Rodgers case, the one District of Idaho opinion that they cited does not hold that.

Instead, that case, the written agreement expressly said that they were paid hourly. It wasn't the absence of a written guarantee. It was the presence of a written contract saying they were paid hourly. The case does not stand for the requirement of a written guarantee.

So these pay letters and this argument that there is common evidence from the pay letters because they don't contain a written guarantee is a red herring, because the pay letters are not what matters. It's the payroll records and the actual course of conduct which the Court can only determine through an individualized inquiry; just like we've gone through with Mr. Sloane, looking at each day of his work and his entire payroll records and deciding was he paid a salary or was he paid a day rate. To try this as a class action, we would have to go through this analysis with every inspector in an entirely separate mini-trial.

Judge Fischer picked right up on this. "The level of compensation for each inspector is determined on an individual basis, after discussions between company executives and members of the human resources department. There are no written compensation policies detailing an inspector pay scale.

Rather, we have pay letters that set forth the general terms."

Mr. Jones argued about well, I would expect to see something written to payroll telling them how to pay these inspectors. Why, when Mr. Groves, who's the chief inspector on the project, knows how the inspectors on his project are paid, and he's the one approving the time sheets and he's the one making sure time sheets reflect the guarantees before they are submitted to payroll? Why would you expect there to be some written memorandum to payroll explaining how the project works?

And again, Mr. Jones's suggestion that Ms. Kramer must be some sort of savant to remember all of these different pay structures. Well, no. At any given time, there are maybe ten or 12 projects going on. And of those ten or 12 projects, several of them will be with the primary, say, four or five clients for Gulf. So Ms. Kramer will know that if she sees a Kinder Morgan project, Kinder Morgan projects are paid to inspectors on a seven-day guarantee. If she sees a MarkWest project, she knows it's paid on a five-day guarantee. This is not that complicated. It's not something that would require a detailed, written manual to explain on every single project what the written guarantee is between the inspectors on site, who clearly know their guarantee for their project, and the limited number of projects going on at the time. There is no inference that some missing evidence is somehow evidence of the lack of a guarantee.

We already showed you the pay letters and how they are not common across the class. The two that were relied on at conditional certification are perfect evidence. A day worked and a calendar day are materially different for these purposes, because whether you work or not, a calendar day comes and goes.

Mr. Sprick testified in his declaration and there is no evidence to the contrary. There is argument from Mr. Jones about what as approved by the client means. But there's not a scrap of evidence to the contrary that as approved by the client means that the client gets involved in the day-to-day approval of pay for any given day for any given inspector.

So what you have in this argument about predominance and common evidence is first they argue about pay letters, but the pay letters are not what is legally determinative here. We look to the payroll and the course of the party's conduct. Even if the pay letters mattered, they are not common across the class. There is not even a way to break them up into subclasses, that you have so many different kinds of pay letters for each individual project, and each inspector might work on six or seven different projects.

You saw Mr. Hinkle himself had six different pay letters. And you would have to go to each pay letter and each project and look at the payroll and then decide was this inspector paid a salary or not. And that would defeat the purpose of class action.

Other than the pay letters that they have focused on, there is no other common evidence of a day rate. You could look to payroll, but that's not common evidence. That's individual to each inspector. You could look at time sheets. Again, individual to each inspector. And even more, Sloane's own payroll and time sheets do not support their argument. You could look to supervisor testimony, but the supervisor testimony is uniform that there has been a guaranteed salary. You cannot bind together a class based on a fact that you deny is true.

They have said the jury might disbelieve Ms. Kramer, who said it's a guarantee. Well, if the jury disbelieves Ms. Kramer, it doesn't mean that they will necessarily find that everybody was treated the same. That's what they have to prove; that everybody was the same and they were all receiving a day rate.

If the jury disbelieves Ms. Kramer's testimony that everyone got a guarantee, they might find that people were treated differently. So they still have the burden to show that everybody was treated the same, and they were treated the same in the way they claim that everybody was treated. And they can’t do it by just saying the jury might not believe Ms. Kramer.

And again, I don't know how you're going to get around Sloane's own testimony, he admitted in his deposition that he didn't work on July 5th. It wasn't a holiday. There is no testimony that holidays were paid on this project. None at all.

There's then Mr. Sloane's own e-mail admitting I had days off. Sundays were my regularly-scheduled days off. And Mr. Groves's declaration says the same thing; there were lots of Sundays when we didn't work at the job site. So if he gets paid for all those days when he's not working, including the one he specifically admitted to, July 5th, there cannot be this common evidence and common policy they insist exists.

The only common evidence is evidence of a guaranteed salary. Ms. Kramer, Mr. Sprick, Mr. Neuberger, Mr. Groves and even the 2014 pay letters, they all say that there's a guaranteed salary being paid. And there is nothing illegal about that. You cannot bind a class together with a fact that you deny is true.

What they are trying to say is that the fact that everybody uniformly testified to a guaranteed salary somehow binds this class that denies there ever was a guaranteed salary.

So at the end of the day what you are faced with, Your Honor, is either there's a common practice, and it's lawful, it's paying a salary, or there is no common practice at all. It's one or the other. And either way there is no -- there is no way to certify a class when the class claims that they were all paid a uniform day rate. Either they all were paid a salary, which is what the evidence shows, or there's no evidence of a common practice at all.

That's what the plaintiffs have offered you, no evidence but lots of allegations.

Again, in Hughes, they followed the same tact they are following here. They originally argued that everybody was paid exactly the same way. That's the argument they're making to you right now, Judge, everybody was paid the same way. They all get a day rate. But then they lost on summary judgment with Mr. Hughes and Mr. McDonald.

And Judge Sargus rejected that argument and said no, at least Mr. Hughes and Mr. McDonald were paid a salary. So if everybody is paid the same way, and we know that Mr. Hughes and Mr. McDonald were paid a salary, then the natural conclusion is that everybody was paid a salary. And there is no point in certifying this class.

Recognizing that, the plaintiffs in Hughes said wait a second. No, everybody was paid differently. Nobody was paid like Mr. Hughes and Mr. McDonald. Their claims do not determine what happens to the rest of the class. Well, that's fine. But if a ruling on the merits of the named plaintiffs' claims do not resolve the claims of the class, then why are we going forward with a class action? Either way certification should be denied.

Next you come to job duties. There is no common proof of job duties. Individual issues related to job duties will predominate here. On class certification they gave you seven declarations. Seeking to certify a class of Pennsylvania inspectors they gave you seven declarations, five of which were from individuals who never worked in Pennsylvania. So those can be just set aside from the outset because they don't have anything to do with a Pennsylvania class.

The last two declarations; one is from Mr. Sloane, and one from an opt-in, Mr. Bish, who is also part of the Ohio case, Mr. Sloane says as a welding inspector, my primary job duties included visually inspecting and observing welding work on pipelines. Okay. That's testimony about what he did. That doesn't tell us or tell the Court or carry a burden of proving that common evidence will answer the job duties question for everybody else in their class.

Mr. Bish says all utility inspectors on any particular project visually inspect pipelines. That's so vague as to be unhelpful, much like the FLSA's definition of an employee. Anyone who is employed by an employer. It's essentially circular. Utility inspectors inspect pipelines.

That tells the Court nothing about what these guy do on a day-to-day basis, and it certainly doesn't carry a burden of proving, by a preponderance of the evidence, that common evidence will answer the job duties question under the two

Pennsylvania exemptions for every member of the class in one fell swoop.

And that's because the evidence actually is individualized. And we have submitted the declarations that show this. When inspectors work on a pipeline, they are going across miles of terrain that could be spread out over hill and dale, if they're in West Virginia; they could be spread out over the great plains, if they're in Texas; these projects are, by nature, geographically spread out, and it spreads people away from each other and keeps them separated during the day.

Welding inspectors at a pipeline are just connecting one section of pipeline to another. It gets welded in a circle. They coat the thing. It gets put in the ground. They move on to the next one. It's the same thing over and over.

In a compressor station, a natural gas compressor station where Mr. Sloane worked, he had to deal with many more kinds of welds, many different kinds of welders, some pipe, some structural steel. He had lots of different welding procedures to apply. It's a far more complicated and technical job than a welding inspector on a pipeline project.

Utility inspectors on a pipeline project, they might be doing things like soil compaction testing, making sure that the soil is not going to be loose once the pipeline is laid in the ground. A utility inspector on a compressor station wouldn't be doing that at all, because they aren't laying any pipeline in the ground. They're building a compressor. They, instead, would be doing things like inspecting concrete pourings, reviewing structural issues.

Like with coding inspectors, they do different things on pipelines and compressor stations. It matters what kind of project these guys are working on, and that's an individualized inquiry.

Project to project, supervisor to supervisor, it changes job duties. As our declarations say, the degree of discretion depends, in part, on the project to which they are inside. Some clients keep a very tight reign on inspectors. Some are more hands off. That's directly relevant to the question of do they show discretion and independent judgment, how closely they have been supervised. And if that changes project to project, then the differences amongst the projects matter, and common proof will not resolve these questions for everyone in one fell swoop.

So at the end of the day, job duties are simply not susceptible of common proof.

But plaintiff does an interesting thing in their reply brief, they cite to a declaration that we had submitted, and they say well, job duties can be proven with common evidence.

Look at Robert Tate's declaration. He says, quote, Based on my experience, chief inspectors are generally" -- and then they tail off. They end the quote. What they left off was -- "generally responsible for supervising other inspectors on a given project, although the number and types of inspectors that they supervise as well as the extent of day-to-day supervision varies depending on the client, the project and the personal style of each inspector."

Mr. Tate didn't say anything of the sort, that common proof can work across all projects for all inspectors. He, to the contrary, said it's different. We need to look at each inspector individually, and each inspector on each project individually to determine what they are doing.

Judge Sargus, again, recognized this, as other courts have. When we are talking about job duties, the applicability of these fact-specific inquiries requires the Court to get into the weeds for each individual person. And because Judge Sargus recognized that, he denied Rule 23 certification.

Other courts have done the same thing. They recognize that job duties are inherently individualized and are not -- absent unusual circumstances, for example, a defendant who has a written job description; for example -- Wendy's, for example. They have a written job description for an assistant manager, and they admit that everybody at every store does exactly the same thing. In that case job duties may be susceptible of common proof. You might be able to look at that job description. There is no such proof here.

This case is far more like the Morgan Stanley case we cited, like the Tahir case that says look, determining whether an employee is exempt is a fact-intensive inquiry, and acknowledging that reality, a number of courts have declined to certify proposed classes in misclassification cases.

Or as The District of New Jersey held in 2011, "Proving liability for the alleged FLSA violation devolves into a mini-trial for each class member, requiring individualized examination of each employee's duties, according to the multi-factorial tests of what properly constitutes work in a bona fide executive or administrative capacity."

That's what would be facing this Court, were it to certify plaintiff's proposed Pennsylvania class; a series of 146 mini-trials, asking each individual on each project that they worked on in Pennsylvania what they did under all the factors of the Pennsylvania exception analysis.

THE COURT: Why doesn't the Ohio action, the Hughes action, foreclose some of the issues of the claims here in Sloane?

MR. HALL: We believe that it does, Your Honor. That the ruling that Mr. Hughes and Mr. McDonald were paid a salary, that ruling on summary judgment by Judge Sargus disproves the fundamental basis of their class argument and of their conditional certification argument, which is everybody was treated the same, they were all paid a day rate.

That cannot possibly be true if we have Judge Sargus saying no, Mr. Hughes and Mr. McDonald were paid a salary. So it does foreclose the group nature of an action here.

THE COURT: Is it an example of issue preclusion?

MR. HALL: I don't believe that it needs to go that far, Your Honor, that you would need to import that analysis. Instead it's -- rather than precluding them from litigating the issue because it's been resolved in another case, what I would say is it's disproof of the fundamental basis of their argument, that they should not -- they cannot say everyone is the same. They were all paid a day rate if Judge Sargus has already said no, these two guys were not.

THE COURT: If I were to deny certification in this matter in Sloane, what would prevent the filing of a suit in one of the federal district courts in, say, West Virginia?

MR. HALL: From one of the opt-ins, Your Honor?

THE COURT: Yes.

MR. HALL: Nothing, other than potentially the statute of limitations. That -- we recognize that denial of certification could lead to other onesies and twosies. But the possibility or the impossibility of efficiently proceeding on a group basis with a class like this is such that there really is no other choice.

The last element of Rule 23, and this is 23(a)(4) that is at issue here, is Mr. Sloane's adequacy as a class representative. He is subject to unique defenses that threaten to hijack this litigation and distract Mr. Sloane to the detriment of the class. He has an extensive criminal history. He has admitted to lying on his resumé, and he has told two completely and inconsistent stories about what he was doing on July 5th, an issue that goes to the very heart of the matter in this case, which is when did he work and when didn't he.

As Your Honor pointed out under 609(a), criminal history can be used to attack truthfulness. Again, these are not unrelated, sort of juvenile offenses of DUIs from 15 years ago. These are convictions for crimes of dishonesty, including forgery.

But we understand we made that argument to Judge Fischer on a motion to dismiss. She denied it. We still think it's relevant to Mr. Sloane's adequacy at this stage.

More important to the adequacy is Mr. Sloane's admission that he's not truthful in his ongoing activities, in his daily life. He admits he lied on his resumé by suggesting he was working for a prior employer from 2010 through 2012, omitting the time that he spent in custody. What he did is he told a bunch of potential employers, each one of them, that he was working somewhere else during the 18 months that he was actually in jail.

And when I deposed him and I asked him well, if it's true that you were in jail, and you would have -- and he was telling me that I would have told anybody who asked me that I was in jail. I said well, if you would have told them the truth, why not just put it in writing. His answer was well, because it takes effort and time, and I'm pretty busy most of the time. He couldn't be bothered to tell the truth.

That is very important evidence to a class representative who has fiduciary responsibilities to all of these absent class members, whose claims will, if certified, be barred by the outcome of Mr. Sloane's litigation.

The Court has an obligation to these absent class members to ensure that their interests are not unfairly prejudiced by being tied to Mr. Sloane's fate, when Mr. Sloane's fate is subject to these unique defenses.

Again, we showed you this earlier, Your Honor, so I won't belabor the point. But you know, it could not get -- Mr. Jones said, you know, issues that don't go to the central heart of the matter should not prevent a class representative on adequacy grounds.

It doesn't get more central to an overtime case than when did you work and when did you not work. And he told two completely different stories, both of them under oath in deposition. That kind of inconsistency, where one of them has to be false, should undermine his adequacy.

So at the end, what we would ask, Your Honor, is that you deny plaintiff's Rule 23 motion for class certification.

Mr. Sloane's claims are not typical. He was paid a salary. They claim to have been paid a day rate. There is no common proof that can resolve the questions of both salary and job duties for all class members at once.

In fact, the only common evidence proves that Gulf has been acting lawfully this entire time.

And Mr. Sloane, at the end of the day, is not an adequate class representative. He has a pattern of dishonesty that will distract from the -- from his prosecution of the class's claims, to the detriment of the absent class members.

Likewise, the motion to facilitate notice should also be denied. There is simply too much evidence in this case for Your Honor to certify -- to even certify conditionally and send out notice to 2,000 inspectors nationwide inviting them to sue Gulf on a day rate theory, when Mr. Sloane himself has been conclusively proven to have been paid a salary.

And I can say conclusively proven, because although you don't make a merits determination at this stage, you cannot say day rate if he was paid on a day he did not work. We have it in his own hand, July 5th, 2014.

Again, Sloane has simply not carried his burden at this advanced stage, with all of this discovery, of showing that he is similarly situated to this entire nationwide class of ten different job titles and 2,000 inspectors working for all of these different supervisors, clients, projects in different states with all kinds of different pay letters and all kinds of individual payroll issues. He hasn't shown that he is similarly situated to all of them, so he should not be allowed to invite all of them to join this lawsuit.

I thank Your Honor for your time. I would be happy to answer any questions you have.

THE COURT: No. You did a good job. Thank you.

All right. This has been a productive oral argument, I think, for me, as oral arguments tend to be. I am busy, as you would expect. And it's going to take me a little while -- I'm going to take this matter under advisement. It's going to take me a little while to sort through this. Don't expect anything before the first of the year realistically and probably well into January, I would guess, at the rate that I'm going.

But we'll get to it in fairly short order because when I have an oral argument, that helps to -- it helps me consolidate the ideas in my own mind, and I try to act with reasonable alacrity in making my ruling.

Again, thank you very much. This was a helpful oral argument entirely today.

I wish you safe travels and a happy Thanksgiving.

MS. IDALSKI: Thank you, Your Honor.

MR. JONES: Thank you, Your Honor.

MR. HALL: Thank you, Your Honor.

MS. SALTZ: Thank you, Your Honor.
THE COURT: The Court will rise.
(4:49 p.m., court adjourned.)

REPORTER'S CERTIFICATE

I, Lori A. Fausnaught, RMR, CRR, Official Court Reporter for the United States District Court for the Middle District of Pennsylvania, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of the within-mentioned proceedings had in the above-mentioned and numbered cause on the date or dates hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my supervision.

s/Lori A. Fausnaught, RMR, CRR

Lori A. Fausnaught, RMR, CRR
Official Court Reporter

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